SUPPLEMENT
TO THE LAW OF EASEMENTS, NATURAL RIGHTS ARISING FROM SITUATION, AND LICENSES, IN INDIA.

SUPPLEMENT

TO THE

LAW OF EASEMENTS, &c.

NATURAL RIGHTS ARISING FROM SITUATION, AND LICENSES, IN INDIA,

[Second Edition]

Bringing the law, as shewn by the reported cases, Indian and English, down to the end of 1905.

BY

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Madras:

PRINTED AND SOLD AT THE LAWRENCE ASYLUM PRESS,

MOUNT ROAD.

1906.

PRINTED BY THE SUPERINTENDENT, LAWRENCE ASYLUM PRESS, MADRAS, 1906.

PREFACE.

THE arrangement of this Supplement is the same as that of the book to which it forms a supplement, the notes and commentaries being placed under the sections of the Indian Easements Act to which they respectively appertain, or to provisions of which they respectively relate or are assignable.

All the notes and commentaries in the Supplement have also been fitted in to their exact proper places in the 2nd Edition of the main book, by a reference, prefixed to each, to the page and exact place in the page, of the 2nd Edition to which it appropriately belongs; so that the reader has only to note in the margin of his copy of the 2nd Edition, at the places indicated, references to the respective pages in the Supplement containing the new notes or commentaries which fit in to those places.

The Addenda and Corrigendum include notes of several cases in Reports published, in the present year, after the body of this Supplement or the portion of it in which, respectively, they would, if published in time, have been included, had been printed.

R. B. M.

July, 1906.

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TABLE OF CASES CITED IN THIS SUPPLEMENT.

The figures denote the pages in which the cases are respectively cited.

ADDENDA.

Section 2.

On p. 4 of this Supplement, in continuation of the paragraph ending with the words "doing of it," insert the following :—

In the Judgment in *Ambalavana Pandara Sannathi* v. *Secretary of State*(1) *Sankaravadivelu Pillai* v. *Secretary of State*(2) was referred to as a case in which "the rights and liabilities of Government in maintaining and improving existing irrigation works have recently been considered by this Court"; and in the same Judgment the Court, in reference to the Government's control of tanks, watercourses, &c., said :(3) "The construction and control of works of irrigation have from the earliest times been the especial function and duty of the Government of India (*Madras Railway Co.* v. *Zamindar of Carvatenagaram*;(4) *Ponnusamy Tevar* v. *Collector of Madura* (5)).

Section 7.

On p. 25 of the 2nd Edition, next after the word "utility" at the end of a paragraph, convert the full stop into a semi-colon and add the following :—

unless such disturbance has been sanctioned by the Legislature(6).

On p. 16 of this Supplement, in footnote (1), next after the words and figures "*Bishop Auckland Industrial Co-operative Society, Ld.* v. *Butterknowle Colliery Co., Ld.*, L.R. [1904] 2 Ch. 419, 424, 436, 441," insert the following :—

confirmed on appeal to H.L.: L.R. [1906] W.N. of 12 May, p. 95.

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(1) I.L.R. 28 Mad. 539, at p. 543.

(2) I.L.R. 28 Mad. 72.

(3) I.L.R. 28 Mad. at p. 542. The actual point decided in *Ambalavana Pandara Sannathi* v. *Secretary of State* was that in a grant by the Government of an inam (made in 1614) the deed (rightly construed) did not include a grant of an irrigation channel (which ran through the inam lands thereby granted, but also through Government ryotwari lands, and other inam lands).

(4) L.R. 1 I.A. 364.

(5) 5 Mad. H.C.R. 6.

(6) *London, Brighton, & South Coast Ry. Co.* v. *Truman*, L.R. 11 A.C. 45.

On p. 39 of this Supplement, next after the paragraph ending with the words "judgment for damages," insert the following paragraph :—

The principle of the decision in *Rylands* v. *Fletcher*(1) extends not only to rights in respect of water but to all other inherent rights of owners of immoveable property to the user or enjoyment of their property as against neighbouring owners, protecting them in such user or enjoyment from injury resulting from any extraordinary or non-"natural" user (though without negligence) by the owner of other immoveable property of his property, unless the latter has acquired an easement, or statutory authority, entitling him to make such use of his property without being liable for such injury. But that principle does not extend to protect an owner (or a person having an interest other than ownership in immoveable property), where he too himself is making a non-ordinary or non-"natural" use thereof, in respect of such an use. In *Eastern and South African Telegraph Co., Ld.* v. *Cape Town Tramways Companies, Ld.*(2) the plaintiffs were the owners of a submarine telegraph cable extending from Cape Town to Europe and of premises in Cape Town where telegraphic messages were received from and transmitted to Europe, and the defendants were the owners of electric tramways in Cape Town and its suburbs, which, with the exception of one section thereof, had been constructed and were worked under powers conferred by certain Statutes, which also empowered them, with the consent of the local authorities, which they had duly obtained, to use the tram-rails as conductors for the return of the electric current, by which the tramcars were propelled, to the generating station. A considerable portion of this return current escaped from the rails, and some of it found its way to the plaintiffs' cable, and caused very frequent and irregular disturbances of the current therein transmitting telegrams, corresponding with the starting, stopping, and alterations in speed of the tramcars, rendering the plaintiffs' apparatus useless during these interruptions. It was proved that by a twin-core shore-end cable laid from the shore out to sea, and connected with their main cable at a point outside the area of disturbance, the plaintiffs could have secured to their apparatus immunity from these disturbances. The Judicial Committee held that the principle of *Rylands* v. *Fletcher*(1) holds good where, as in Cape Colony, the Roman-Dutch law is in force, but that the defendants were not liable under that principle, in respect of the escape of electricity from that portion of their tramways which had not

(1) L.R. 3 H.L. 330; 1 Ex. 265.
(2) L.R. [1902] A.C. 381.

been constructed under statutory authority (though with the consent of the Authority in whom the roads were vested) and in respect of which therefore they were not protected by Statute, because there was "no injury" (to the plaintiffs) "of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property,"(1) but in this case the plaintiffs' instrument differed from "things used in the ordinary enjoyment of property" "in its peculiar liability to be affected by even minute currents of electricity"(2). "The appellants," their Lordships said in the Judgment,(2) "as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands* v. *Fletcher*,(3) which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as shewing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain."

Chapter II.

On p. 44 of this Supplement, next after the paragraph ending with the words "in accordance with the order," insert the following paragraph:—

Where the defendants constructed and worked certain electric tramways under powers conferred by certain Statutes, whereby it was provided that in the event of any electric leak taking place they should be liable for any damage which might thereby be caused by electrolysis or otherwise, it was held by the Judicial Committee that the escape of part of the electricity from the tram-rails which took place, and caused damage to the plaintiffs as owners of a submarine electric telegraph cable, was not a leak within the meaning of this provision, the defendants having, as required by the Statutes, obtained the consent of the local

(1) L.R. [1902] A.C. at p. 392.
(2) L.R. [1902] A.C. at p. 393.
(3) L.R. 3H. L. 330; 1 Ex. 265.

Authority to their using their rails as conductors for the return of the electric current, by which the tramcars were propelled, to the generating station, and such escape being "a natural incident of the operations legalised under the Statutes"(1).

Section 13.

On p. 77 of the 2nd Edition, in continuation of the paragraph ending with the word "doubt," insert the following:—

But in *Krishnamarazu* v. *Marraju*,(2) in which on the question of the defendant's claim, under paragraph (*e*) of section 13 of the Indian Easements Act, as owner of a share under a partition of joint immoveable property, to a right of way over the adjoining portion of that property which fell to the share of the plaintiff, it was held that an easement of necessity does not include a right of way over *alienum solum* which is the most convenient means of access to the claimant's tenement when he has another means of access thereto without passing over *alienum solum*, the Court said in the Judgment:(3) "In the Bombay cases of *Esubai* v. *Damodar Ishvardas*(4) and *Municipality of City of Poona* v. *Vaman Rajaram Gholap*(5) a suggestion was made that the question of convenience might legitimately be considered, but there is no decision by the Courts of this country that the criterion is convenience and not necessity. The case of *Wutzler* v. *Sharpe*(6) is an authority for holding that the test under the law of this country is the same as under the English law."

On p. 80 of the 2nd Edition, in continuation of the paragraph ending with the words "*Thomas* v. *Owen*," insert the following:—

In *Krishnamarazu* v. *Marraju*,(7) in which the plaintiff and the defendant had respectively become the separate owners of two adjoining tenements under a partition of joint family property, it was held that the defendant's claim, under paragraph (*f*) of section 13 of the Indian Easements Act, to a right of way to and from his tenement over the plaintiff's tenement was not maintainable, because the easement claimed was not an apparent and continuous one. It seems evident from the report, in this case, that there was no

(1) *Eastern and South African Telegraph Co., Ld.* v. *Cape Town Tramways Companies, Ld.*, L. R. [1902] A.C. 381.
(2) I.L.R. 28 Mad. 495.
(3) I.L.R. 28 Mad. at p. 497.
(4) I.L.R. 16 Bom. 552, at p. 559.
(5) I.L.R. 19 Bom. 797.
(6) I.L.R. 15 All. 270.
(7) I.L.R. 28 Mad. 495.

formed road over the plaintiff's vacant site over which the defendant claimed a right of passage.

Section 47.

On p. 278 of the 2nd Edition, next after the paragraph ending with the word "circumstances," insert the following fresh paragraph :—

In *Zaffer Nawab* v. *Emperor*(1) the public were held to have acquired by prescription (*sic*), by unobstructed user "for many years—one witness said for 30 years—," the right to cross, on foot and in vehicles, a certain river at a place where it was, in its natural condition, always fordable even in the rainy season except for a very few days during the freshets. Z, the owner of lands through or near which the river flowed, erected a bund across the river at a short distance from this ford, lower down the river, the effect of which was to raise the water of the river and make it unfordable at the place where the public had used to ford it. It appeared from a judgment of a Civil Court of 1869 and 1870 that Z had a right to erect such a bund. It was held that his right to erect such a bund had been lost "by long desuetude, while the public have clearly acquired a prescriptive right of way through the river." The order passed by a Magistrate under section 133 of the Criminal Procedure Code to remove the bund, as causing a nuisance to the public, was confirmed by the High Court.

(1) I.L.R. [1906] 32 Calc. 930.

CORRIGENDUM.

Section 34.

On p. 111 of this Supplement, for the words "And it results," in the paragraph beginning with those words, substitute the following :—

And it was held by Swinfen Eady J. that it results.

and next after, and in continuation of, that paragraph insert the following :—

But this decision has now been reversed by the Court of Appeal.(*a*)

and to the footnotes on that same page (111) add the following :—

(*a*) Collins M. R. and Cozens-Hardy L. J., Romer L. J. dissenting : L. R. [1906] W. N. of 19 May, p. 105.

THE
INDIAN EASEMENTS ACT,

ACT V OF 1882,

(AMENDED BY ACT XII OF 1891)

An Act to define and amend the law relating to Easements and Licenses.

Section 2.

On p. 2,* as a commentary on section 2, insert the following :—

Sub-section (*a*).

Government officers of the Irrigation Department have no power under Bombay Act VII of 1879 to dam a water-course, at a place where it flows through the land of a private owner, on the ground that it derives its water supply by leakage or percolation from an irrigation canal, but have only a right under that Act to charge a water-rate on lands which derive benefit from such leakage or percolation. The riparian owners in the case of such a watercourse are governed by the law applicable to watercourses.(1) In *Secretary of State* v. *Balvant Ganesh Oze*(2) a *nálá*, in the Bombay Presidency, which was found to be a natural stream, derived its supply of water partly from rain water from hills and the catchment area of the *nálá*, and partly by percolation from a Government irrigation canal, the latter of the two sources being, except in abnormal periods of drought,

(1) *Balvantrao* v. *Sprott*, I.L.R., 23 Bom., 761.

(2) I.L.R., 28 Bom., 105.

***The references to pages are to the pages in the 2nd Edition.**

perennial and the more important of the two. The Government was held not to be entitled under any of the provisions of the Bombay Irrigation Act, VII of 1879, to control the water in the *nálá* by the construction of a dam across the *nálá* for the purpose of supplying a riparian owner on the banks of the *nálá* with water and preventing it from flowing down to the lands of the defendant, another riparian owner lower down the *nálá*, who was not willing to pay water-rate, and the defendant was held to have the usual rights of riparian owners on the banks of natural streams in respect of all the water in the *nálá*, as soon as it had entered the *nálá*, whether such water entered it by natural means, or by leakage or percolation from the artificial channel of the canal (so long as the canal authorities allowed such leakage to continue).

In the Madras Presidency the Government has the right to regulate the distribution of water supplied to its ryotwari villages through the Government channels and reservoirs, subject to an implied contract by the Government with its tenants from year to year of irrigable land, renewed each year, that the existing conveniences for the supply of water for irrigation will not be interfered with to the prejudice of the tenant during the continuance of the tenancy.(1) But this right which the Government has for the public benefit does not entitle the Government to cause a man's lands to be flooded and damaged by the construction of a work, though that work may be thought desirable in connection with the general distribution of water for the public benefit.(2) In *Sankaravadivelu Pillai* v. *Secretary of State*(3) the Government had in 1882 constructed a calingula or bye-wash in a Government channel, for the purpose of reducing the flow of water through the channel into a certain tank, which was incapable of holding with safety the quantity of water

(1) *Krishna Ayyan* v. *Venkatachella Mudali*, 7 Mad. H. C. R., 6. See also *Madras Ry. Co.* v. *Zemindar of Carvatenagram*, L.R., 1 I. A., 364, at p. 385; 6 Mad. H. C. R., 180.

(2) *Sankaravadivelu Pillai* v. *Secretary of State*, I.L.R., 28 Mad., 72.

(3) I.L.R., 28 Mad., 72.

which would otherwise have flowed into it. The necessary effect of this would have been that the water so diverted from the channel would have flooded the plaintiffs' lands, to obviate which result the Government acquired a piece of land and formed a small drainage channel to carry off the surplus water. This drainage channel did not fully answer its purpose, the water to a certain extent running over the plaintiffs' lands, and in 1895 a flood occurred, inundating the plaintiffs' lands and lowering their level, and since then up to 1900, when the suit was brought, they had been practically under water and rendered uncultivable. It was found that, notwithstanding the lowering of the plaintiffs' lands, water would not flow over them if the calingula had never been constructed. The plaintiffs were held entitled to an injunction restraining the Government from flooding the plaintiffs' lands by causing or permitting water to flow from the Government channel on to their lands.(1) Sir Subramaniya Aiyar was of opinion(2) that, taking the position of the Government in regard to liability for damage caused to land-owners or occupiers by Government irrigation works as analogous to that of persons or corporations acting under statutory authority, as it had been regarded as being by their Lordships of the Privy Council in *Madras Ry. Co.* v. *Zemindar of Carvatenagram*,(3) the authority of the Government so far as the construction of new works is concerned is only permissive, while as regards the maintenance of works previously completed the authority is imperative. The construction of the calingula, in this case, being a new work, the authority to construct it must accordingly be considered to be merely permissive. Therefore, though there might have been no negligence in the actual construction of

(1) This injunction did not necessitate the Government blocking up the bye-wash; provided proper drainage-channel works were constructed for preventing the water from overflowing the plaintiffs' lands.

(2) See I.L.R., 28 Mad., at p. 78.

(3) L.R., 1 I.A., 364, 384—386.

the calingula, the Government was, in accordance with the principle laid down in *Canadian Pacific Ry. Co.* v. *Parke*(1) and other cases, not protected from liability if damage to other persons resulted from the calingula having been made; that principle being that when the legislature has authorized a person to make a particular use of property and the authorization is permissive merely, the thing sanctioned is not to be done in prejudice of the common law right of others, but if the authorization is imperative the person so authorized incurs no liability however much injury he may cause to others by doing the thing authorized, provided he is not guilty of negligence in the doing of it.

Sub-section (*b*). As to customary rights in gross *in alieno solo* see note on p. 169,* and addenda thereto in this Supplement.

In *Welcome* v. *Upton*(2) it was held that a heritable profit à prendre in gross, consisting of a right of a man, descendible to his heirs, and not appurtenant to the ownership or occupation by him of any land or other corporeal hereditament, to depasture his cattle on land belonging to another person, is acquirable by immemorial user, and that this right is capable of being transferred. Whether such right could be, and, as was pleaded by the defendant, had been, acquired under the Prescription Act, 1832 (ss. 1 and 5) by thirty years user, was not decided.

In *Shuttleworth* v. *Le Fleming*(3) it was held by the Court of Common Pleas that no rights in gross (whether profits à prendre or other rights in gross) are within the scope of the English Prescription Act, 2 and 3 Will. IV, c. 71, and that therefore the free fishery in gross pleaded by the defendant in that case as having been acquired under that Act, (firstly) by 30 years uninterrupted enjoyment, and

(1) L. R. [1899], A. C., 535. See the notes to section 8, in this Supplement, on that and other cases.

(2) 6 M. & W., 536; 52 R. R., 767.

(3) 19 C. B. (N.S.), 687.

(4) L. R. [1899], A. C., 535. See the notes to section 8, in this Supplement, on that and other cases.

*** The references to pages are to the pages in the 2nd Edition.**

(secondly) by 60 years such enjoyment, had not been acquired by him.

Section 4.

On p. 6,* next after the words "curtilage or land," insert, as fresh paragraphs, the following:—

In *Hanbury* v. *Jenkins*(1) Buckley J. expressed it as his opinion that an incorporeal hereditament can be appendant or appurtenant to an incorporeal hereditament in the case of a right of way along the banks of a river (or part of a river) being attached, as an easement, to a right of several fishery in that river (or that part of it), assuming it to be a fishery *in alieno solo*, *i.e.* that the owner of the fishery is not the owner of the land over which the river (or that part of it) flows; the two incorporeal rights being in this case, in his opinion, in the words of Co. Litt., 121 b, note 7, "capable of union without incongruity," and therefore within the exception there stated to the general rule laid down by Lord Coke, that an incorporeal thing cannot be appendant to an incorporeal thing. But it was unnecessary for him to decide the point, because he held that the fishery in question in the case was not an incorporeal right of fishing in the water in question, but was incident to the ownership of the soil, under that water, which he found to be vested in the plaintiff. It was not a license to use the way, but an easement of way, which is an incorporeal hereditament, which was in question in that case. It may be remarked, however, that if the river in question had been (which it did not appear to be) one which could not be fished from boats but only from the bank, the right of fishery itself would have carried with it an accessory license(2) to use the banks for the fishing.

A claim on behalf of the public to a prescriptive right to discharge water from a public road or highway on to adjoining land belonging to a private owner, as an easement

(1) L. R. [1901], 2 Ch., 401, 421—423.

(2) See section 55 of this Act.

* The references to pages are to the pages in the 2nd Edition.

acquired by the public, as being occupiers of the highway by virtue of their right of way over it and, as such, the holders of a dominant tenement, to which the right claimed was capable of being annexed, was held not maintainable There was no dominant tenement, it was held, to which such a right could be attached, in such a case.(1) The point whether the public could by *prescription* (as was claimed) have acquired the right claimed does not appear to have been raised in the arguments nor considered in the judgment, nor the point whether that right could be considered as having been so acquired by the plaintiff Corporation, and its predecessor in title, as trustee for and on behalf of the public, nor the point whether an incorporeal hereditament can be attached as appendant or appurtenant to an incorporeal hereditament, if the two are "capable of union without incongruity"—as to which see the note above on *Hanbury* v. *Jenkins*(2)—and, if so, whether the right to discharge the water on to the defendant's land was such a right as could without incongruity be so attached to the right of way.

On p. 7,* next after the words "*Illustration* (*a*) thereto," insert, as part of the same paragraph, the following :—

So, where a defendant claimed a profit à prendre for the beneficial enjoyment of a house, of which she was the owner, and proved enjoyment by her and her predecessor in title of the profit in question for a period and of a character such as is required for establishing a prescriptive title to such profit à prendre, except that their enjoyment was shewn by

(1) *Attorney-General and Bromley R. D. Council* v. *Copeland*, L.R. [1901], 2 K. B., 101, 106. The judgment of Lord Alverstone C. J., here reported, was reversed on appeal, but not upon this point, which was not raised in the appeal: L.R. [1902], 1 K. B., 690. The Court of Appeal decided the case solely on the ground that the discharge of the water on to the defendant's land was within certain statutory powers given to the Corporation and its predecessor in title, the contrary having been held by Lord Alverstone C. J., and that from the long undisputed user a legal origin to the right claimed ought to be presumed.

(2) L.R. [1901], 2 Ch., 401.

*** The references to pages are to the pages in the 2nd Edition.**

the evidence to have been had by them not as owners or occupiers of that particular house, but as belonging to the whole body of the inhabitants of a parish, who all claimed the right to the same profit, as such inhabitants generally, irrespective of what houses they occupied or for how long they occupied them—as a fluctuating body, in fact—the defendant was held to have failed to have proved a prescriptive title to the profit à prendre, the user not having been one appertaining to—for the beneficial enjoyment of—the particular house in respect of which it was claimed.(1)

On p. 8,* next after the words "such covenant," insert, in continuation of the same paragraph, the following:—

A covenant restricting the mode of use or enjoyment of land gives the person entitled to the benefit of the covenant an equitable interest in the land which is annexed to and runs with the land, and binds it even in the hands of a person who has acquired title thereto by adverse possession.(2)

On p. 8,* footnote (3), next after "*Luker* v. *Dennis*, L. R., 7 Ch. D., 227," insert the following:—

Greenhalgh v. *Brindley*, L.R. [1901], 2 Ch., 324, at p. 327.

On p. 12,* next after the words "only buildings," insert, as part of the same paragraph, the following:—

In *Glasgow Corporation* v. *M'Ewan*,(3) by a Scottish Act "heritors" in a certain parish were liable to assessment for the upkeep of the parish manse. The appellant Corporation had acquired, by purchase and conveyance, from the proprietor of certain land in the parish a right described in the conveyance as "all and whole the heritable and irredeemable servitude, right, privilege, and tolerance, of a way-leave through" that land, "for the purpose" (in the words of the

(1) *Lord Rivers* v. *Adams*, L. R., 3 Ex. Div., 361, at pp. 370, 371.

(2) *Nisbet and Potts' Contract, In re*, L.R. [1905], 1 Ch., 391; *Tulk* v. *Moxhay*, 2 Ph., 774; *Rogers* v. *Hosegood*, L.R. [1900], 2 Ch., 388, 405.

(3) L. R. [1900], A. C., 91.

*** The references to pages are to the pages in the 2nd Edition.**

conveyance) "of their opening up the surface of the land, and forming, constructing, and maintaining therein a culvert or conduit for carrying water to the city of Glasgow, and executing all necessary works in connection therewith." In the exercise of this right of way-leave the Corporation conveyed the water through this land, underground, partly by a bore driven through rock, partly by a tunnel lined with masonry, and partly by pipes. The House of Lords held that they were, in respect of the conduit so made by them and the space within it, proprietors of land and "heritors" within the meaning of the Act, and, as such, liable to be rated under the Act. Lord Shand, however, was of opinion that though the appellants, in respect of the conduit and the space within it, were, in substance, for rating purposes the owners of the land, *in title* they held only a servitude, but that even if what they were entitled to was only a servitude, it was a "heritable" subject or property, and, as such, rendered them liable, as "heritors," to be rated under the Act,(1) and his Lordship referred, in support of his opinion, to observations of Lord Cranworth, L. C., in *Hay* v. *Edinburgh Water Co.*(2).

On p. 12,* next after the words "against the Crown," insert, as part of the same paragraph, the following:—

The determination of the question whether user of land has operated to create a prescriptive right of property in the land or only a prescriptive easement over it, depends on the object and intention with which the acts of user were done. Thus in *Philpot* v. *Bath*(3) the defendant, who owned premises abutting on the foreshore, claimed that he had acquired a title of ownership to a portion of the foreshore by adverse possession, under the Statute of Limita-

(1) L. R. [1900], A. C., at pp. 100, 101.

(2) 1 Macq., 682.

(3) L. R. [1905], W. N., 114. See also *Lancaster* v. *Eve*, 5 C. B. (N. S.), 715; *Wood* v. *Hewett*, 8 Q. B., 913.

*The references to pages are to the pages in the 2nd Edition.

tions, by the fact that his predecessors in title had placed on the foreshore in front of those premises, and they and he had maintained there for a long period of time, stones or boulders. The Court of Appeal held that the evidence did not shew that the boulders had been deposited by the defendant's predecessors in order to assert a title of ownership to the soil on which they were deposited, but that they were intended to be merely ancillary to the use by them of the defendant's (then their) premises, as a protection thereto from encroachment by the sea, and therefore he had not acquired the property in the soil, but only an easement to place and maintain boulders thereon for the purpose of such protection.

On p. 14,* next after the words "against their landlord," insert, as a fresh paragraph, the following:—

A several fishery, which is an exclusive right to fish in a certain place,(1) may exist as a profit à prendre appurtenant, or as a profit à prendre in gross, or as incident to the ownership of the soil under the waters of the fishery. But where a several fishery is proved to exist, a presumption arises that the owner of the fishery is also the owner of the soil over which the waters of the fishery extend; and this is so, whether the waters of the fishery are neither tidal nor navigable by the public,(2) or are non-tidal but navigable by the public,(3) or are tidal and navigable by the public and are part of the sea where it flows and ebbs over the foreshore so that the presumption is against the Crown(4).

On p. 16,* to the footnote (1), add the following:—

As to covenants restricting the user of land, but not creating easements, see note thereon in commentary on section 8.

(1) See *Hanbury* v. *Jenkins*, L.R. [1901], 2 Ch., at p. 411 (*per* Buckley J.), and other cases there referred to.

(2) *Ecroyd* v. *Coulthard*, L.R. [1897], 2 Ch., 554, 570; *Hanbury* v. *Jenkins*, L.R. [1901], 2 Ch., 401, 411.

(3) *Hindson* v. *Ashby*, L. R. [1896], 2 Ch., at pp. 7, 10, 11.

(4) *Attorney-General* v. *Emerson*, L. R. [1891], A. C., 649, 655.

*** The references to pages are to the pages in the 2nd Edition.**

On p. 18,* in continuation of the paragraph ending with the word "prescription," insert the following :—

See also *Ranchod Shamji* v. *Abdulabhai Mithabhai*(1), commented on below.

and next thereafter insert, as a fresh paragraph, the following :—

Regarding other easements not acquirable by prescription see section 17 and notes thereto, and note to section 15 on pages 148, 149.

On p. 18,* next after the words "right or easement," insert, in continuation of the same paragraph, the following :—

In *Ranchod Shamji* v. *Abdulabhai Mithabhai*,(2) in which the plaintiff had acquired a prescriptive right to maintain projecting beams, which had been inserted in the wall underneath the roof of his house, and overhung the defendant's land, and the defendant erected a building which overhung those beams, it was held, following *Corbett* v. *Hill*,(3) that the vertical column of air-space above the projecting portions of the beams did not, as contended by the plaintiff, belong to him, but that the whole vertical column of air-space above and below those projecting portions belonged to the defendant, whose right to the whole space vertically above his land *usque ad cœlum* was only diminished to the extent of the protrusion of the beams.

In a case in Bengal,(4) where the Indian Easements Act is not in force, it was held that the right, which the plaintiffs claimed, to maintain a cornice of the roof of their house projecting over the roof of the defendants' house, could not be acquired by prescription, the cornice having been erected merely for the purpose of ornamentation. The Court relied on *Bagram* v. *Khettranath Kurformah*.(5)

(1) I.L.R., 28 Bom., 428.
(2) I.L.R., 28 Bom., 428.
(3) L.R., 9 Eq., 671.
(4) *Nritta Kumari Dassi* v. *Puddomoni Bewah*, I.L.R., 30 Calc., 503.
(5) 3 Beng. L.R. (O.C.), 18, 47.

* The references to pages are to the pages in the 2nd Edition.

On p. 18,* in footnote (3), next after "*Harvey* v. *Walters*, L.R., 8 C. P., 162," insert the following:—

See also *Harris* v. *De Pinna*, L.R., 33 Ch. D., at p. 260.

Section 6.

On p. 21,* for the words "see note to section 9," substitute the following:—

See notes to sections 9 and 28.

and next thereafter insert, as a fresh paragraph, the following:—

Where certain minerals in certain land and the right of working and winning them from an existing pit in other adjoining land are demised, but no rights in the surface of the former land are included in the demise and the right to enter upon that surface is expressly withheld, but the lease contains a proviso that if at any time during the term of the lease the lessee should think it necessary or desirable to sink a pit or pits on the said surface and should give notice thereof in writing to the lessor his heirs or assigns, he should have the right to do so, "but so that the position of such pit or pits be subject to the reasonable approval of the said lessor his heirs or assigns," the lessee has such an interest in that surface and every part of it as entitles him to compensation under the Lands Clauses Consolidation Act, 1845, if a part of it is taken by a railway company for their railway under the compulsory powers of that Act (1); and this interest appears to be an easement subject to a condition precedent.

Section 7.

On p. 23,* next after the words "such ownership," insert, as a fresh paragraph, the following:—

The words, in the section, "subject to any law for the time being in force" refer to (*inter alia*) such restrictions on, interferences with, or exceptions to, the exclusive rights

(1) *Masters and Great Western Ry. Co., In re*, L. R. [1901], 2 K.B., 84; L. R. [1900], 2 Q.B., 677.

*** The references to pages are to the pages in the 2nd Edition.**

of proprietors as they are rendered liable to under Municipal Acts and other Acts giving power to Corporations or public officers to enter upon lands or buildings of private owners for the purpose of executing works, such as the laying of water or drainage pipes, and repairing them, and for other purposes,(1) under Salt Monopoly Acts, and under other enactments passed in the interests of the public.

On p. 23,* in footnote (1), after "*Moore* v. *Rawson*, 3 B. and C. 339," add the following:—

Bradford Corporation v. *Ferrand*, L. R. [1902], 2 Ch., 655, at pp. 661 to 663.

On p. 25,* to footnote (2) add the following:—

And see *Trinidad Asphalt Co.* v. *Ambard*, L. R. [1899], App. Cas., 594, at pp. 602, 603.

On p. 26,* next after the paragraph ending with the word "question," insert the following fresh paragraphs:—

In *Royal Mail Steam Packet Co.* v. *George & Branday* (2) the plaintiffs and the defendants respectively were the owners of wharves abutting on a harbour, and separated from one another only by a narrow strip of land. The defendants, in carrying on their business, used to unload coal from, and load it into, vessels lying at their pier, on to, and from, their wharf, and, as a result of this, coal-dust from their premises was carried by the wind on to the plaintiffs' wharf and caused substantial inconvenience and discomfort to the plaintiffs, but the defendants had acquired by prescription a right of easement to cause such nuisance. If, as alleged by the plaintiffs, owing to extensions of the defendants' premises made by the defendants, the coal-dust carried on to the plaintiffs' wharf premises rendered their wharf, and their house thereon, unwholesome and uncomfortable to occupy,

(1) *E. g.*, see *G. I. P. Ry. Co.* v. *Municipal Corporation of Bombay*, I.L.R., 23 Bom., 358; Crim. Pro. Code (Act V of 1898), ss. 47, 48, 98, 102.

(2) L. R. [1900], A. C., 480.

*** The references to pages are to the pages in the 2nd Edition.**

and live in, it affected them in respect of their right to purity of air, but if, as also alleged by them, it damaged their goods on their wharf premises and the buildings thereon and vessels lying thereat, it affected them in respect of their general right to use and enjoy their wharf and the buildings thereon (compare paragraph (*a*) of this section(1)).

It is clear that an easement may be acquired by prescription to cause what would otherwise be an actionable nuisance by discharging smoke, from a chimney or otherwise, over a neighbour's land, so as to pollute the air passing over that land and materially interfere with his comfortable enjoyment of his land. But it is going a step further to say that one can acquire by prescription such a right to discharge smoke over one's neighbour's land as will disentitle the neighbour to erect a building on his land which will have the effect of obstructing such discharge of smoke. In *Kashinath* v. *Narayan*(2) it was held that if a person has acquired by prescription a right to discharge smoke through smoke holes in a wall of his house over a neighbour's land, the latter is legally precluded from erecting on his land a building which will have the effect of interfering with the free passage of smoke through such smoke holes over that land.

Illustrations (*b*) and (*c*).

The scope and extent of the rights given in *Illustrations* (*b*) and (*c*) and other *Illustrations* as examples of the particular rights included in the rights generically described in the body of this section, are perhaps most clearly and best realizable and definable by a consideration of the different nuisances which severally constitute actionable interferences with those particular rights and their enjoyment. Easements (and licenses), constituting limitations, or restrictions, of those particular rights, are rights to do what would, but for the existence of those easements (or those licenses) be actionable nuisances infringing those particular rights, severally. Further, some torts belonging to the

(1) in a phase of that right not falling within *Illustration* (*b*) or any of the other *Illustrations* to this section.

(2) I.L.R., 22 Bom., 831.

class called nuisances are disturbances of easements. To a considerable extent, therefore, the subject of Easements and that of Nuisances overlap one another, and an Act, or a treatise, dealing with the one properly and necessarily deals, incidentally, with the other.

On p. 26,* next after the words "on the quality of the soil," insert a reference to a new footnote (*x*), and at the foot of that page, insert that footnote, *viz.* the following:—

(*x*) *Trinidad Asphalt Co.* v. *Ambard*, L. R. [1899], A. C., 594; *Humphries* v. *Brogden*, 12 Q. B., 739, 745.

On p. 27,* next after the paragraph ending with the word "surface," insert the following:—

Where, through contract and consequent instrument of conveyance, or under an Inclosure Act, the ownership of the surface land and of the land subjacent thereto is severed, the surface becoming vested in one person, and the underlying land, or the mines and mining rights therein, in another, the question whether the common law right of support to the surface land belongs to the former person or has been parted with depends on the terms of the instrument or the Inclosure Act. In *New Sharlston Collieries Co., Ld.*, v. *Earl of Westmorland* (1) the plaintiff was the owner of surface lands, all the mines, veins, and seams of coal, iron, and other ores within and under which had been granted by deed to J. C. & Sons, Ld., by the plaintiff's predecessor in title. The deed conferred on the grantees in very ample terms full mining rights (in respect of the said mines, &c.), and power to construct and do all such works and things as might be necessary or convenient for working the mines, including the making and erection of wharves, staiths, engines, workmen's cottages, stables, stores, buildings, tram, rail, and wagon-ways, works, and machinery upon the surface of the land, and the use of heap room and ground room thereon, provided that they were to do as little damage as

(1) L. R. [1904], 2 Ch., 443 (note).

*** The references to pages are to the pages in the 2nd Edition.**

might be consistent with the due and proper carrying on of the works. The deed contained a covenant by the grantees that no pit, shaft, drift, or level should be sunk or driven which should injure or endanger any building belonging to the grantor(1) erected on the land nor any work or thing be constructed, placed, or done in or on or within 20 yards of any such building or in or on any garden belonging thereto. Then followed a covenant by them to pay compensation to the grantor(1) for the use and occupation of or for damage to any of the surface land which might be used and occupied or damaged by them in exercising their powers, at the rate of double rent and assessments; to level and make good surface land and restore it so as to be fit for tillage, and pay a rent of £200 per acre for all land not so restored, and to fill up pits and maintain fences; and to pay the grantor(1) full compensation for any damage which might be occasioned to the surface land or to any building thereon by the exercise of any of their powers granted, and might not be covered by the said double rent and assessments and the rent of £200 per acre. The defendants, who were tenants under the grantees by a lease which placed them in the same position as the grantees were in respect of their powers and obligations under the deed of grant, claimed to be entitled to so work the mine as to cause subsidence of the surface. The House of Lords held, on the construction of the deed of grant, that the grantor had not given up the common law right of support of the surface and given the grantees the right to cause its subsidence. The same principles of law which are applicable to cases of severance of ownership of the surface and of the subjacent land effected by instruments *inter partes* are applicable to such cases of severance effected by Inclosure Acts. In both cases there is at the outset a *primâ facie* right in the owner of the surface to support of the surface, which can only be displaced—and the burden of shewing that it has been displaced lies on the person denying the

(1) or his assigns.

right—by express words, or by plain implication from the words used, in the instrument or the Inclosure Act.(1) In *Bishop Auckland Industrial Co-operative Society, Ltd.*, v. *Butterknowle Colliery Co., Ld.*,(2) Farwell J. said: "The question is one of construction in each case, and the same principles apply whether the document be a grant, lease, or Inclosure Act. The latter is nothing more than a statutory agreement between the parties, or, as Lord Selborne puts it,(3) 'It is a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or have had determined for them by the authority which made the award.'" In *Duke of Buccleuch* v. *Wakefield*(4) the Inclosure Act there in question was held to authorize the owner of the mines to let down the surface, but this (as pointed out in the judgments of Lord Selborne L. C. and Lord Watson in *Love* v. *Bell*(5) was because the terms in which the reservation and grant to him of mining powers were made in that Inclosure Act, as well as the terms of the compensation clause therein, were so comprehensive as to shew that the reservation and grant of powers were intended to include the right to let down the surface, and that the compensation for damage included compensation for damage caused by such subsidence; differing, in this respect, materially from the terms of the reservations and compensation clauses in *Love* v. *Bell*, and, it may be added, from those in *Bishop Auckland Industrial Co-operative Society, Ld.*, v. *Butterknowle Colliery Co., Ld.*, (6); in both

(1) See *New Sharleston Collieries Co., Ld.*, v. *Earl of Westmorland*, L.R. [1904], 2 Ch., 443, 446; *Bishop Auckland Industrial Co-operative Society, Ld.*, v. *Butterknowle Colliery Co., Ld.*, L. R. [1904], 2 Ch, 419, 424, 436, 441; *Davis* v. *Treharne*, L. R., 6. App. Cas., 460.

(2) L. R. [1904], 2 Ch., 419, 425.

(3) in *Love* v. *Bell*, L.R., 9 App. Cas., 289, 290, 291.

(4) L. R., 4 H. L., 377.

(5) L. R., 9 App. Cas., 286, 295, 298. See also *Consett Waterworks Co.* v. *Ritson*, 64 L.J. (Ch.), 293, n.; L.R., 22 Q.B.D., 318, 702.

(6) L. R. [1904], 2 Ch., 419, 437, 439, 441, 442, 443.

which two last-named cases the surface owner was held, on the construction of the Inclosure Acts respectively in question therein, to have the right of support.

On p. 29,* next after the paragraph ending with the word "damage," insert the following fresh paragraphs :—

In *Popplewell* v. *Hodkinson*(1) it was decided that a landowner who drains his land, if it becomes for any reason necessary or convenient to do so, and by so doing withdraws water from wet and spongy ground forming the surface stratum of adjoining land belonging to another, and thereby causes subsidence of the surface of that neighbour's land and damage to his buildings thereon, commits no wrong against that neighbour, except, possibly, where there has been a grant, express or implied, to the latter of a right of support which would be infringed by such withdrawal of water.

In *Jordeson* v. *Sutton, Southcoates, and Drypool Gas Co.*(2) the plaintiff was the owner of land with houses on it. The defendants, under statutory powers(3) vested in them, acquired some land adjoining that of the plaintiff, and proceeded to excavate their land for the purpose of erecting a gasometer, and in so doing cut through an underground stratum of silt, or sand and water commixed like quicksand, which extended through both the defendants' and the plaintiff's land, the proportion of sand therein greatly preponderating over that of water. The defendants conducted their operations of making, and pumping water out of, their excavation with care and skill, and constructed a barricade to prevent silt in the plaintiff's land from falling in, but notwithstanding these precautions large quantities

(1) L. R., 4 Ex., 248.

(2) L. R. [1899], 2 Ch., 217; [1898] 2, Ch. 614.

(3) These powers did not, however, the Court of Appeal unanimously held, exempt them from liability if in constructing their works they occasioned a nuisance, so that the question had to be decided whether the plaintiff's common law right to support had been infringed by the defendants.

*** The references to pages are to the pages in the 2nd Edition.**

of the water, and a considerable quantity of the sand with it, escaped from the portion of the said stratum which was within the plaintiff's land, through the interstices of the barricade, into the excavation. This caused subsidence of the superincumbent soil and consequent structural damage to the said houses thereon. The majority (1) of the Court of Appeal held that the defendants had committed an actionable nuisance at common law, *viz.* an infringement of the plaintiff's natural right to support of his surface soil, and confirmed the judgment of North J., awarding the plaintiff damages(2) for the damage sustained by him from the subsidence. They refrained from deciding the question whether a landowner can without infringing his neighbour's right of support so dig, excavate, drain water in, or otherwise deal with, his own land as to withdraw from his neighbour's land underground water forming a stratum lying between solid soil beneath and solid soil above it, being of opinion that it was unnecessary to decide it because the case before them was not a case of disturbance of support by abstraction of water only, but by abstraction of sand as well as water, from the plaintiff's land. Observations, however, (*obiter*), were made by them, in their judgments, with reference to that question to the effect that they were not disposed to regard *Popplewell* v. *Hodkinson*(3), or any other cases, as authorities for the proposition that under no circumstances (excepting cases of grants) can there be any right to support of land from water; or, in other words, for the proposition that any

(1) Lindley M. R. and Rigby L. J. In his judgment Lindley M. R. referred to, and quoted from, the judgment of Field C. J. in an American case, *Cabot* v. *Kingman* (166 Mass. Rep., 403), in which the facts were very similar to those in *Jordeson* v. *Sutton, Southcoates, & Drypool Gas Co.* and the question of law for decision was the same, and the majority of the Court (four out of seven Judges) came to the same conclusion thereon as did the majority of the Court in this English case. See L.R. [1899], 2 Ch., at p. 240.

(2) He only claimed damages, the defendants having filled in the excavation, and no further subsidence or damage being anticipated. See L.R. [1898], 2 Ch., at pp. 614, 628.

(3) L.R., 4 Ex., 248.

landowner may, by operations in his own land, draw away water, not flowing in a defined channel, from beneath his neighbour's land without regard to any consequence which may arise to that neighbour.(1) The dissentient Judge(2) was of opinion that the evidence established that the subsidence of the plaintiff's land had been caused merely by the withdrawal of water-support; and that there was no right of support from water (otherwise than by grant); that on principle there ought not to be any such right; and that there had been no case in which such a right had (except where acquired by grant) ever been affirmed. He reviewed, in his judgment, *Popplewell* v. *Hodkinson* and other cases,(3) and pointed out how, in his opinion, they each and all supported the conclusion that every landowner has a right to drain his own land or otherwise deal with underground water therein (not flowing in a defined channel), though by so doing he withdraws underground water (not flowing in a defined channel) from his neighbour's, or any other remoter, land, without being liable to an action for any subsidence or damage caused thereby to such neighbour or the owner of such remoter land (except where by grant a right of support has been created which would be infringed thereby). He held, therefore, that judgment ought to be given against the plaintiff's claim for damages in respect of the subsidence.

The Judgments in *Jordeson* v. *Sutton, S., and D. Gas Co.*(4) decided as to the natural right to support. The subsidence would have equally occurred if there had been no houses on the plaintiff's land,(5) and therefore if his

(1) See L. R. [1899], 2 Ch., at pp. 239 and 242—244.

(2) Vaughan Williams L. J.

(3) *Acton* v. *Blundell*, 12 M. & W. 324; *Chasemore* v. *Richards*, 7 H. L. C. 349; *Ballard* v. *Tomlinson*, L. R., 29 Ch. D., 115; *Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch., 483; 24 L. T., 402; *Bradford Corporation* v. *Pickles*, L. R. [1894], 3 Ch. 53; *Rigby* v. *Bennett*, L. R., 21 Ch. D., 559; *Shelfer* v. *City of London Electric Lighting Co.*, L. R. [1895], 1 Ch. 287; *Smith* v. *Kenrick*, 7 C. B., 515.

(4) L. R. [1899], 2 Ch., 217.

(5) See L. R. [1899], 2 Ch., at p. 221; [1898], 2 Ch., at p. 625

natural right to support had been infringed, he was entitled to recover damages for the damage done to the houses, whether he had acquired an easement of support for them or not. As a matter of fact, however, he had acquired such easement by prescription(1); and with reference to this Rigby L. J., in his judgment, said that in *Popplewell* v. *Hodkinson*(2) the Court recognized the possibility of a right of support of buildings from underground water not flowing in a defined channel being conferred by grant, express or implied, which, in his (Rigby L.J.'s) opinion, "involved the conclusion that, when support to buildings from water is enjoyed for twenty years, the right to it becomes absolute," and that, assuming this to be the law, as the damaged houses (of the plaintiff, Jordeson) had been built for more than twenty years when the support was withdrawn, "the defendants would not have been acting within their right even if their operations had been confined to surface drainage of water."(3)

The question whether a landowner can, without infringing his neighbour's natural right to support, by operations in his own land, lawful in themselves, withdraw underground water not flowing in a defined channel from his neighbour's land, under all circumstances and without any limitation, or, if not, what are the limitations to such right, must, therefore, it would appear, be considered to be one still remaining judicially undetermined.

In *Trinidad Asphalt Co.* v. *Ambard*(4) the land in a portion of the island of Trinidad contained a stratum of valuable asphalt or pitch, which in a few places cropped out on the surface, but for the most part lay a few feet below the surface. This land was not cultivated and its whole

(1) See L. R. [1899], 2 Ch., at pp. 218, 244; [1898], 2 Ch., at pp. 625, 626.

(2) L. R., 4 Ex., 248. (3) L. R. [1899], 2 Ch., at p. 244.

(4) L. R. [1899], A. C. 594. And a short note of this case is appended to the report of *Jordeson* v. *Sutton, Southcoates, & Drypool Gas Co.*, L. R. [1899], 2 Ch., at p. 260.

value depended on the pitch contained in it. So long as the pitch was undisturbed it was stable and firm enough to support the soil above in its natural state, but if an excavation was made in the stratum the pitch on the sides of the excavation, being exposed to the hot atmosphere, began to melt and move into the excavation. The plaintiffs and the defendants were respectively owners of two adjoining plots of this land. The defendants dug out pitch in their own plot and brought their excavations therein close up to the boundary line between the two plots, the result of which was that a large quantity of the pitch in the plaintiffs' plot was withdrawn therefrom and passed into those excavations, and the surface of their plot subsided and cracked. It was contended that the pitch, being of a semi-fluid and fugitive nature, ought to be regarded as on the same legal footing as subterranean water, and that, if this was so, then it followed that there was no absolute right to support of soil from underground pitch on which it rested, and that the plaintiffs had no property in the pitch in their plot until they reduced it into possession, *i.e.* abstracted it from the land, and that, if from the defendants' operations in that part of the stratum which lay within their own plot pitch was (owing to its own character and action, as would have been the case if it had been water) withdrawn from the plaintiffs' land, and the surface soil thereof, being thus deprived of support, sunk and was damaged, no right of the plaintiffs had been infringed by the defendants and no action lay against them for such withdrawal of support; and *Popplewell* v. *Hodkinson*,(1) and *Elliott* v. *N. E. Ry. Co.*,(2) were referred to as supporting these contentions as to the law relating to subterranean water. The Judicial Committee decided against this contention, on the simple ground that asphaltum is a mineral and not water, and were of opinion that it was "not necessary to discuss the question as to the right of support from subterranean water, because the substance which afforded

(1) L. R., 4 Ex. 248 (1869). (2) 10 H. L. C. 333 (1863).

support in this case was not water. As was laid down" (continues their Judgment(1), "by the Court of Queen's Bench in *Humphries* v. *Brogden*(2), the nature of the strata must be immaterial; it is impossible for the Court to measure out degrees to which the right of support for the surface may extend. 'The only reasonable support,' as Lord Campbell observed, 'is that which will protect the surface from subsidence and keep it securely at its ancient and natural level.'" The judgment of the Court of first instance, granting an injunction restraining the defendants from digging pitch in their plot in any such way as to destroy or seriously injure the surface of the plaintiffs' plot, which had been reversed by the Full Bench of the Trinidad Supreme Court, was therefore restored.

On p. 32,* next after the paragraph ending with the words "restrain him," insert the following fresh paragraphs:—

If underground water flows in a defined natural channel to where it issues from the ground as a spring, and thence flows above-ground in a defined course as a natural stream, but the existence and course of the underground channel are not known and cannot be ascertained except by excavation, the riparian owners on the banks of the stream have no right of action against the owner (or the occupier) of any of the land through which the underground water flows if he, by sinking shafts or wells or executing other works in that land, diverts that water so that the supply to the spring and the stream fed by it is cut off.(3)

See, further, regarding the right enunciated in this *Illustration* (*g*), notes to *Illustration* (*e*), above, p. 29,* and addenda thereto in Supplement.

Illustration (*h*)

The right specified in *Illustration* (*h*) as belonging to

(1) L. R., [1899] A. C. at p. 602. (2) 12 Q. B. 739, 745.

(3) *Bradford Corporation* v. *Ferrand*, L. R. [1902], 2 Ch. 655; *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R., Ir. 172; *Black* v. *Ballymena Township Commissioners*, 17 L. R., Ir. 459; and see note to *Illustration* (*h*) to this section.

*** The references to pages are to the pages in the 2nd Edition.**

riparian owners in the case of a natural stream is not infringed if the stream before it reaches their lands flows underground in a defined channel but the existence and course of the underground stream are not known and are not discoverable except by excavation, and if the owner of land through which the underground stream flows, by sinking shafts or wells or executing other works in that land, diverts the water, so that the supply to the stream above-ground is taken away or materially diminished.(1) Such a case must be distinguished from a case such as those of *Mostyn* v. *Atherton*(2) and *Dudden* v. *Clutton Union*(3), in which the water was abstracted as it rose from the earth and issued forth at the spring itself: see note to the *Explanation* defining a "natural stream" (at end of *Illustrations* to this section).

On p. 32,* to footnote (5) add the following :—

And see *Chaplin & Co., Ld.*, v. *Westminster Corporation*, L. R. [1901], 2 Ch. 329.

On p. 33,* next before the paragraph beginning with the words "The question," insert the following paragraph :—

With regard to the term "natural stream" see *Explanation* (at end of *Illustrations* to this section) and notes thereon in Supplement.

On p. 33,* to footnote (1) add the following :—

Followed in *Dinkar* v. *Narayan*, I. L. R.. 29 Bom. 357.

On p. 34,* next after the words "permitted limits or not," insert a reference to a fresh footnote "(*x*)", and to the footnotes on that page add the following :—

(*x*) See also *Narayan* v. *Keshav*, I. L. R., 23 Bom. 506.

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(1) *Bradford Corporation* v. *Ferrand*, L. R. [1902], 2 Ch. 655; *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R., Ir. 172; *Black* v. *Ballymena Township Commissioners*, 17 L. R., Ir. 459; and see note to *Illustration* (*g*) to this section.

(2) L. R. [1899], 2 Ch. 360.

(3) 1 H. & N. 627; 26 L. J. Ex. 146.

***The references to pages are to the pages in the 2nd Edition.**

On p. 34,* next before the words "If a riparian proprietor," insert, as part of the same paragraph, the following :—

An upper riparian proprietor may use the water of a natural stream for irrigation even to the extent required for converting dry lands (*punja*) into wet lands (*nanja*), provided he can do so, and does so, without materially diminishing the volume of water naturally flowing to the lower proprietors' lands.(1)

On p. 34,* to footnote (2) add the following :—

See also *Roberts* v. *Gwyrfai District Council*, L.R. [1899], 2 Ch. 608 ; [1899] 1 Ch. 583.

On p. 35,* delete the passage from the words "In *Earl of Sandwich*" to the words "being held reasonable", and the whole of footnote (1) on that page.

On p. 35,* in footnote (2), next after the reference to *Bickett* v. *Morris*, insert the following :—

Roberts v. *Gwyrfai District Council*, L.R. [1899], 2 Ch. 608 ; 1 Ch. 583.

On p. 36,* next after the words "upper proprietor onward," insert the following :—

or otherwise to materially alter the natural, accustomed, flow of the stream, (*x*).

and to the footnotes on that page add the following :—

(*x*) *Roberts* v. *Gwyrfai District Council*, L.R. [1899], 2 Ch. 608 ; 1 Ch. 583 ; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L.R., 7 H.L. 697 ; 9 Ch. App. 451.

On p. 36,* delete the passage from the words "Where, however, the defendants" to the words "committed by them," and footnote (3), and next after the words "involves risk of injury" insert the following :—

A riparian owner cannot construct an embankment or other work on his land in order to protect it from inundation or encroachment by a natural stream, even in times of ordinary

(1) *Narasimha Sastrial* v. *Secretary of State*, 1 Madras Law Journal, 167.

* **The references to pages are to the pages in the 2nd Edition.**

flood, and thereby throw the water of the stream on to the land of another riparian owner, without incurring liability to pay the damages occasioned thereby, and also to be restrained by injunction from continuing such injury.(1) It would be otherwise in case of measures taken against extraordinary or accidental floods.(1)

In *Roberts* v. *Gwyrfai District Council*,(2) the plaintiff was owner of a water-mill and lands belonging thereto, through which flowed a stream which issued from a lake, and the defendants, who were lessees of the lake and of some land adjoining it, had constructed a dam across the end of the lake, so as to increase the water storage therein, with a sluice to regulate the out-flow therefrom, and had laid down pipes for supplying certain villages within their district with water from the lake. The plaintiff, as he admitted, had sustained no actual damage by the alteration thus caused in the flow of water in the stream, and it was contended that the effect of the defendants' works would be to improve the flow of water to the plaintiff's mill, causing it to be constant, instead of intermittent, as the plaintiff admitted it had sometimes been in dry seasons; but it was held (by the Court of Appeal, confirming the judgment appealed against), that the right of the plaintiff as riparian owner was to have the water flow down the stream in its accustomed, natural, way, and that this accustomed flow having been altered by what the defendants had done, the plaintiff's right had been infringed, whether the alteration improved the flow of water to his mill or not, and that he was entitled to an injunction restraining the defendants from so taking water from the lake for supplying their district and from

(1) *Menzies* v. *Breadalbane, Earl of*, 3 Bligh, N. S., 414; *Venkatachalam Chettiar* v. *Zamindar of Sivagunga*, I. L. R., 27 Mad. 409. The latter case was one of an artificial watercourse, proceeding from an irrigation tank, but one which had existed from time immemorial. The judgment in *Gopal Reddi* v. *Chenna Reddi*, I. L. R., 18 Mad., 158, may be reconcileable with *Menzies* v. *Breadalbane, Earl of*, though it contains passages apparently inconsistent with it (see Judgment of Sir S. Subramania Aiyar in *Venkatachalam Chettiar* v. *Zamindar of Sivagunga*, I. L. R., 27 Mad., at pp. 412, 413).

(2) L. R. [1899], 2 Ch. 608; 1 Ch. 583.

doing any other act for that purpose whereby the flow of water in the stream through the plaintiff's lands and mill would be diminished.(1)

In his speech in the House of Lords case, *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.*(2), Lord Cairns L. C., thus summarized the general features of the law of England as to the rights of upper and lower riparian owners: "Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But, further, there are uses no doubt to which the water may be put by the upper owner, namely uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing

(1) L. R. [1899], 2 Ch. at p. 612. The decision was also based on the ground that the use to which the defendants were applying the water, not being for the beneficial enjoyment of the land of which they were owners, but for that of lands owned and occupied by others, was a use which was not within the defendants' rights as riparian proprietors (L. R. [1899], 2 Ch. at p. 612). [The case was also decided on the ground that the acts of the defendants were not, as claimed by them, within the powers conferred on them by the Public Health Act, 1875, which only empowered them to construct waterworks, provided they did not "injuriously affect" the rights of other persons, so that under the Act too the matter resolved itself into the question whether the common law right of the plaintiff as riparian owner had been infringed.]

(2) L. R. 7 H. L. 697, at p. 704.

purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water."

If the natural flow of a natural stream through or alongside of a riparian owner's land has been, or has been threatened to be, anywise materially altered or disturbed, by the acts, or the commenced or intended acts, of any person not having any right of easement or other special or acquired right so to do, the former will, ordinarily, be entitled to an injunction, or a declaration of rights, or to both (as the case may be), against the latter; and this, whether the former has sustained any actual damage by such alteration or disturbance or not; for, if otherwise, the person so interfering with his right to the natural flow of the stream might acquire a prescriptive title to do so, to the extinguishment of the riparian right of the former. In *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.*(1), in which the rights of the respondents as owners of a riparian tenement called Wayte's Mill had been invaded by the appellants, Lord Cairns L. C. said, in his speech: "It is a matter quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained or has not been sustained by the respondents. If the appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be." On the same

(1) L. R. 7 H. L. 697, at pp. 705, 706.

ground, in *Roberts* v. *Gwyrfai District Council*(1), the Court of Appeal held the plaintiff to be entitled to an injunction, though the alteration in the flow of the water of the natural stream there in question, produced by the defendants' works, had caused no damage in fact to the plaintiff, and it was doubtful on the evidence whether the effect of such alteration might not be even to improve the flow of the stream for the purposes of the plaintiff as riparian owner; and Lindley M. R., in his judgment, with reference to the fact that the defendants claimed as a right, as had the defendants in *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.*(2), to use the water of the stream in the manner complained of by the plaintiff, and the consequent acquisition by them of a prescriptive right against him so to do which would ensue by their adverse user for the required period unless he was entitled to obtain the protection of the Court therefrom, cited the latter of the above-quoted passages from the speech of Lord Cairns L.C. in *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.*(3).

In *McCartney* v. *Londonderry & Lough Swilly Ry. Co.*(4) the plaintiffs' railway crossed a stream, admitted to be a natural stream, by a culvert, and for a few feet on each side of the culvert their land abutted on the stream. The defendant was the owner of a mill lower down the stream, worked by the stream. The plaintiffs, by a pipe, inserted into the stream at the side of the culvert, conducted water from the stream to a tank on their land about half a mile from the culvert, for supplying the boilers of their locomotive engines, which were used over their railway, which was forty miles in length, and also over other connected railways over which they had running powers. They claimed to be entitled as of right as riparian owners to make this use of the water of the stream. The House of Lords, reversing the judgment of the majority of the Irish Court of

(1) L. R. [1899] 2 Ch. 608.
(2) L. R. 7 H. L. 697.
(3) L. R. [1899] 2 Ch., at p. 614.
(4) L. R. [1904] A. C. 301.

Appeal, unanimously held that the plaintiffs were not so entitled, though the damage sustained, or likely to be sustained, by the defendant was small, and that the defendant was justified in stopping up the pipe, which he had done. The case was held to be covered by the decision of the House in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*(1). The user of the water claimed by the plaintiffs was neither within the range of the ordinary or primary purposes for which a riparian proprietor has the right of user, *viz.* domestic purposes, and the wants of his cattle, nor within the range of his right of user for extraordinary or secondary purposes. Lord Macnaghten said (2): "In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character." The plaintiffs' claim was not within these rights, being a claim to use the water over the whole of their railway, as well as over certain other railways; and without restoring to the stream a single drop of the water they abstracted therefrom, but consuming it entirely. Further, though the damage caused to the mill-owner (the defendant) was small, yet, if the railway company were allowed to continue this use of the water of the stream without interruption for twenty years, they would gain a prescriptive right to such use, and such an invasion of his rights he was entitled to prevent.(3) In regard to the extent of their land over which the railway company's rights as riparian owners extended, Lord Macnaghten said(4):

(1) L. R. 7 H. L., 697.
(2) L. R. [1904] A. C., at p. 307.
(3) L. R. [1904] A. C., at pp. 309, 310, 313. See also *Sampson* v. *Hoddinot*, 1 C. B. (N.S.) 590; *Harrop* v. *Hirst*, L. R., 4 Ex., 43.
(4) L. R. [1904] A. C., at p. 311.

"In my opinion it would be extravagant to suggest that the system of the Londonderry and Lough Swilly Railway Company and the lines of other companies over which they have running powers form one single riparian tenement, or that the railway company, by virtue of contact with this stream at one point, possess throughout their system, and all through the lines of other companies over which they have running powers, rights analogous to those possessed by persons who dwell on the banks of a river in respect of their riverside property. It may be difficult to say how far the rights of the railway company as riparian owners extend, but they can hardly go to such a length as that."

The House of Lords, in this case, overruled(1) the decision of Bacon V. C. in *Earl of Sandwich* v. *Gt. Northern Railway Co.*(2)

The owner of a tenement adjoining a natural stream has no right to divert the water of the stream to a place outside the tenement and there consume it, even though he does not thereby diminish the flow of water to lower riparian tenements, and a lower riparian proprietor has a right of action against him for so doing, though he may not have sustained any damage through diminution of the flow of water thereby.(3)

On p. 36,* next after the words "artificial stream" at the end of a paragraph, insert, in continuation of the same paragraph, the following:—

But there are cases in which the owner or owners of land abutting on artificial streams deriving their water-supply from a natural stream or a spring have been held to have the same rights as riparian owners on the banks of a natural stream.(4)

(1) L. R. [1904] A. C., 305, 314.

(2) L. R., 10 Ch., D. 707.

(3) *Aiyavu Meoppan* v. *Sawminatha Kavundan*, I.L.R., 28 Mad. 236.

(4) *Holker* v. *Porritt*, L. R. 8 Ex. 107; 10 Ex. 59; *Roberts* v. *Richards*, 50 L. J. (Ch.) 297; *Nuttall* v. *Bracewell*, L. R. 2 Ex. at p. 14; *Sutcliffe* v. *Booth*, 32, L. J. (Q. B.) 136; *Venkatachalam Chettiar* v. *Zamindar of Sivagunga* I. L. R., 27 Mad. 409. And see note to section 15 on "Artificial watercourses" in Supplement.

*** The references to pages are to the pages in the 2nd Edition.**

On p. 36,* next after the reference in footnote (2) to *Bickett* v. *Morris*, insert the following:—

And see note on that case in Supplement, under section 35.

On p. 39,* next after the paragraph ending with the words "natural right," insert the following fresh paragraphs:—

Explanation. —"natural stream."

The *Explanation* of the term "natural stream" occurring in *Illustrations* (*h*) and (*j*) of the section defines a "natural stream," but no definition is given of a "stream," the definition of which has, however, presented considerable difficulty, and has been of much importance as being a point upon which the decision of cases has turned. In *M'Nab* v. *Robertson*(1) the respondents before the House of Lords had let, to a person whose assignee the appellant was, a distillery, cottages, and some land with two ponds therein "together with" (in the words of the lease) "right to the water in the said ponds and in the streams leading thereto." A stream flowed from the hill above into the upper pond, through that pond, and down to the lower pond. This was the only stream which led to the ponds, if the word "stream" be taken in the sense of a body of water flowing in a defined channel. But at and before the time of the lease there was a spring situated above the level of the lower pond, most of the water from which spring percolated (or, as some of the witnesses described it, "seeped," *i.e.* oozed or soaked) through a piece of marshy or spongy land lying between the spring and the pond, and so passed by gravitation into the pond. This piece of land as well as the ground in which the spring rose belonged to the respondents and were not included in what was demised by the lease. The water of the ponds was used by the appellant for the purposes of his distillery. Subsequently to the lease the respondents placed in their land which had not been included in the lease a cistern and pipes communicating with, and drawing off the water of, the spring, so that water from the

(1) L. R. [1897] A. C. 129.

*** The references to pages are to the pages in the 2nd Edition.**

spring ceased to pass into the pond by percolation through the piece of marshy land. Lord Halsbury L. C., agreeing with the Court of first instance, the Lord Ordinary, was of opinion that the word "streams" in the lease was used in a sense which included all sources of supply of water to the pond and that it was capable of being used and interpreted in a sense which included the water of the spring coming to the pond by percolation through the intervening marshy piece of land. The majority of their Lordships(1) were of the contrary opinion, and accordingly the decision of the lower Appellate Court upon the point was affirmed. Lord Watson, in the course of his speech, said: "I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream."(2)

In *Mostyn* v. *Atherton*(3) an urban district council, who were, as such, in possession of certain land, had by an indenture purported to grant to the defendant a license giving him the exclusive right to abstract water from St. Winifred's Well for the purpose of bottling and selling it (the water being believed to possess medicinal properties). In the said land was a spring of water forming the source of an ancient natural stream. The water of the spring welled up through holes in the rock from beneath to the surface, as it had done for hundreds of years, in great volume, and discharged itself into a stone structure forming a basin and called the Octagonal Well, from which it passed

(1) Lords Watson, Shand, and Davey.

(2) L. R. [1897] A. C., at p. 134.

(3) L. R. [1899] 2 Ch., 360.

into another basin called the Lady's Well, then into a place used as a bath, and then flowed on down to the sea, as it had done for hundreds of years, in the natural course of a natural stream. The two wells were collectively known as St. Winifred's Well. The whole structure, including the wells, and a roof supported by stone pillars over them erected, as it appeared, for the protection of the shrine of St. Winifred, had existed for several centuries. The evidence showed that what the defendant proposed to do under his license would have the effect of sensibly diminishing the flow of the water of the stream past the tenements of the mill-owners and other riparian proprietors on the banks of the stream. The plaintiff, who was the proprietor of land abutting on the stream on both sides, and of several mills and works thereon, and who and his predecessors in title had for more than a hundred years enjoyed the free and uninterrupted flow of the water from the wells down the stream and had used it for the purposes of their mills, brought his suit for an injunction restraining the defendant from in any way interrupting or interfering with the accustomed flow of the water of the stream through his lands. The license granted to the defendant to take the water purported to include the right to abstract it through pipes let in below the stone wall of the well and tapping the spring before it reached the surface, and he contended that the riparian rights of the plaintiff would not be infringed by the abstraction of water of the spring before it came to the surface, nor by its abstraction from the well, because until the water had passed beyond the two wells it was passing through an artificial channel and was not a natural stream. But these contentions were overruled, the former on the authority of *Dudden* v. *Clutton Union*(1), and in regard to the latter contention the learned Judge who decided the case(2) held that it was not distinguishable from *Dudden* v.

(1) 1 H. & N. 627; 26 L. J., Ex. 146., see also *Bunting* v. *Hicks*, 70 L. T. 455.

(2) Byrne J.

Clutton Union(1), and he therefore granted the injunction: "It has been put to me," he said in his Judgment(2) "that there was here an artificial erection making, in fact, the well as distinguished from the spring, and that therefore that was not a natural watercourse direct from the spring down past the lands of these riparian proprietors to the sea, because it first passes through this artificial construction or well. I do not think that that argument is well founded or sufficient to distinguish this case from *Dudden* v. *Clutton Union*.(3) This is a spring which issues, as I have said, direct as a spring from the rock. I think the true view to take is that the spring existed, and existed as a spring coming direct from the land and running in a natural course, and the fact that at some remote date some one has built round and over the issuing point, the source of the spring, in order to improve its method of issuing from the earth, will not be sufficient to distinguish this from the case above cited, which holds that you must not at the source of the spring destroy the natural flow from the spring all down the natural course of the stream." In *Dudden* v. *Clutton Union*(3) there was a spring the water of which rose to the surface of the earth and then flowed in a natural channel till it reached and was discharged into a river, whereon was a mill belonging to the plaintiff, which was worked by the water of the river. The defendants, acting under a license from the owner of the soil in which the spring rose, sunk a cistern to a considerable depth into the earth at the spot where the spring rose, so that the water as it rose was caught in the cistern, out of which it was conducted by pipes laid by them to a workhouse, and thus prevented from flowing into and down the

(1) 1 H. & N. 627; 26 L. J., Ex. 146, see also *Bunting* v. *Hicks*, 70 L. T. 455.

(2) L. R. [1899] 2 Ch. at p. 369. He also decided that the wells were public wells, vested in the urban district council, the licensors, under the Public Health Acts of 1848 and 1875, but that those Acts did not authorize them to use, or grant a use of, the water of the spring or wells to the prejudice of the riparian rights of riparian owners on the stream.

(3) 1 H. & N. 627; 26 L. J., Ex. 146.

channel. The [Court of Exchequer pointed out that the water of the spring on its coming to the surface flowed in a natural channel till it entered the river, and held that it was as much an infringement of the plaintiff's rights as riparian owner to divert the water while it was springing to the surface as it would have been to divert it when it was flowing along that channel.

Cujus est solum, ejus est usque ad cœlum.

If branches, of a tree growing on a temple enclosure, overhang a landowner's land adjoining the enclosure, the fact that the tree is an object of religious veneration to the community to the service of whose religion the temple is dedicated cannot override the property rights of the owner of the land, and he has the right to cut off so much of the branches as are vertically above his land, and can obtain an injunction restraining any person from obstructing him in so doing.(1) Nor can an easement to have branches of a tree overhang a neighbour's land be acquired by prescription, for however many years they may have been so overhanging.(2)

On p. 39,* delete the paragraph beginning with the word "Another" and ending with the words "on to A's land," and footnote (4) and in place thereof insert the following fresh paragraphs:—

Right to prevent artificial discharge of water.

Easements relating to water may be acquired in derogation of the right of a landowner that his land shall not be flooded or damaged by a discharge of water on to or into it artificially caused by another landowner—a right which seems to fall within paragraph (*a*) rather than paragraph (*b*) of the body of this section; as, *e.g.*, an easement acquired by A to get rid of water in or on his land by discharging it through an artificial drain or watercourse on to

(1) *Behari Lal* v. *Ghisa Lal*, I.L.R., 24 All. 499. No local custom appears to have been set up in this case.

(2) See notes in commentaries on sections 15 and 17.

*The references to pages are to the pages in the 2nd Edition.

B's neighbouring land.(1) In *Canadian Pacific Ry. Co.* v. *Parke*(2) the defendants had, under authority given by certain enactments of the British Columbian legislature, brought water from a source outside their own land on to their land for the purpose of irrigation, and the water percolating through that land into the land of the plaintiffs, underlying their (the plaintiffs') railway, had caused a landslip therein and consequent serious damage to the plaintiffs. The defendants claimed to be entitled by virtue of those enactments to allow this escape of water notwithstanding those consequences; but their claim to such an easement was held to fail on the ground that those enactments were merely permissive, and not imperative.(3)

The natural right of a landowner to enjoy his land free from being flooded or damaged by the discharge of water artificially collected on, or brought on to, his neighbour's land by the latter, and escaping therefrom on to or into the land of the former, even though such escape and discharge of water may not be due to negligence on the part of that neighbour, but to *vis major* or "the act of God," was affirmed in the well-known case of *Rylands* v. *Fletcher*.(4) Such neighbouring landowner is equally entitled to the enjoyment of his land, but the full enjoyment of his land to

(1) *Arkwright* v. *Gell*, 5 M. & W. 203, 228; *Wright* v. *Williams*, 1 M. & W. 77; *Metropolitan Board of Works* v. *L. & N. W. Ry. Co.*, L.R. 17 Ch. D. 246; *Bala* v. *Maharu*, I.L.R. 20 Bom. 788; *Kiefer* v. *Le Séminaire de Québec*, L.R. [1903] A.C. 85; *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*, I.L.R. 27 Bom. 344; *Raja of Venkatagiri* v. *Raja Muddu Krishna*, I.L.R. 28 Mad. 15; *West Cumberland Iron and Steel Co.* v. *Kenyon*, L. R. 11 Ch. D. 782; *Sankaravadivelu Pillai* v. *Secretary of State*, I.L.R. 28 Mad. 72. The right in the case where the flooding is caused by a lower riparian proprietor damming up the stream and thereby penning back the water, so that it overflows on to the land of a riparian proprietor higher up, appears to fall within *Illustration* (*h*). See commentary on that *Illustration*.

(2) L.R. [1899] A. C. 535 (P. C.).

(3) See notes in Supplement, for insertion in commentary on section 8, regarding the rule in cases turning on the question whether an easement consisting of a right to commit what would otherwise be an actionable nuisance has been granted by the legislature. See also notes on section 2, sub-section (*a*), in Supplement.

(4) L.R. 3 H. L. 330; 1 Ex. 265. See also *Canadian Pacific Ry. Co.* v. *Parke*, L.R. [1899] A. C. 535.

which every owner is entitled is subject to the obligation expressed in the maxim *sic utere tuo ut alienum non laedas*, and if he stores water on his land in a reservoir, or otherwise accumulates water artificially on his land, and if the water so brought on to or stored in his land should escape and flow into his neighbour's land and cause damage to his neighbour, then, though he is perfectly entitled, if he chooses to do so, to deal with his land in this way, yet he is liable to make good to his neighbour the damage so caused, however careful he may have been and whatever precautions he may have taken to prevent such escape of the water and consequent damage. He has made what was termed by Lord Cairns L. C., in that case, a "non-natural" or extraordinary use of his land, and if he does this he does it at his peril. But if in the course of any "natural" or ordinary user of his land any accumulation of water, either on the surface or underground, has taken place, and if by the operation of the laws of nature (as, *e.g.*, by percolation or natural flow) that accumulation of water passes off into his neighbour's land, and there does damage, the neighbour suffers no legal injury. It is the business of the latter to protect himself against such damage, if he wishes to do so, by interposing some barrier to keep out the water or otherwise.(1) In accordance with this doctrine, where the defendant, for the foundations of a building to be erected on his land, dug a trench thereon close to the back wall of the plaintiff's house, and rain-water collected in the trench and percolated into the foundations of the plaintiff's house and caused damage to the house, the Bombay High Court held that the defendant was not liable, the trench having been dug by him, not for the purpose of storing water therein, but for the foundations of a building, which was an ordinary and "natural" use by him of his land, and the water having accumulated in the trench and passed therefrom into

(1) See Judgments in *Rylands* v. *Fletcher*, L.R. 3 H. L. 330; 1 Exch. 265; *Baird* v. *Williamson*, 15 C. B., N. S., 376; *Smith* v. *Kenrick*, 7 C. B. 515; *Wilson* v. *Waddell*, L.R. 2 App. Cas. 95; *Snow* v. *Whitehead*, L.R. 27 Ch. D. 588.

the plaintiff's tenement by the operation of the laws of nature.(1) In *R. H. Buckley & Sons, Ld.* v. *N. Buckley & Sons*(2) the plaintiffs and the defendants were the owners respectively of two adjoining plots of land, which may be called the upper plot and the lower plot. Both plots had formerly belonged to one person, who had constructed a goit or watercourse across the upper plot, by which he conducted water from a river to a mill on the lower plot for the purpose of working that mill, for which purpose it had ever since then been used. At the head of the watercourse there was a sluice-gate or shuttle by which the flow of the water from the river into the watercourse was controlled. The common owner of the two plots had granted the upper plot, which the upper part of the watercourse traversed, to predecessors in title of the plaintiffs, excepting out of this grant and reserving the part of the watercourse which crossed that plot together with full power to enter upon the granted land for the purpose of repairing the watercourse; and upon that plot a mill had been afterwards erected. Subsequently to that grant he had granted the lower plot, with the mill thereon, and the watercourse, to a predecessor in title of the defendants. Subsequently to the latter grant the plaintiffs had acquired an easement entitling them to make use of water in the watercourse for the purposes of their mill, and to have the flow of the water in the watercourse free and unobstructed. In consequence of the defendants having allowed the sluice-gate to get out of repair a flood in the river carried it away, and the flood water rushing into the watercourse overflowed its banks and flooded the plaintiffs' plot, causing damage to the plaintiffs. It was held that the obligation which the defendants' predecessor in title, who had made the watercourse for his beneficial use of land which continued to belong to him after he had alienated the upper plot, and his successors in title to the lower plot, were under to keep the

(1) *Moholal* v. *Bai Jivkore*, I.L.R. 28 Bom. 472.
(2) L.R. [1898] 2 Q. B. 608.

sluice-gate in repair, so as to prevent flood water in the river getting into the watercourse and overflowing on to the plaintiffs' land, was not done away with by the plaintiffs having acquired the said easement, assuming that the easement carried with it the incidental or accessory right to repair the sluice-gate,(1) and by the fact that the easement imposed no liability on the defendants to do any repairs,(2) and that therefore the plaintiffs were entitled to judgment for damages.

Budhu Mandal v. *Maliat Mandal*(3) was a case of an easement, acquired by the plaintiffs by prescription, to divert water from a river and by means of works constructed on their own land to cause it to flow over the 1st defendant's land and thence on to the lands of the plaintiffs lying beyond, for the purpose of irrigating the latter. *Narayana Reddi* v. *Venkatachariar*(4) was a case of an easement, acquired by prescription by the defendants, who were holders of lands situated below a tank, to erect a dam upon the calingula of the tank, the effect of which was that the water in the tank increased in depth and it spread into the plaintiffs' lands, situate on the high-level side of the tank, and submerged them at certain seasons.

On p. 39,* to footnote (1) add the following :—

See also *Raja of Venkatagiri* v. *Raja Muddu Krishna*, I.L.R. 28 Mad. 15; *West Cumberland Iron and Steel Co.* v. *Kenyon*, L.R. 11 Ch. D. 782.

Section 8.

On p. 41,* to footnote (2) add the following :—

New Sharlston Collieries Co., Ld. v. *Earl of Westmorland*, L.R. [1904] 2 Ch. 443. And see notes to section 7, *Illustration* (*e*).

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(1) *Cf.* section 24 of this Act.

(2) *Cf.* section 27 of this Act.

(3) I.L.R. 30 Calc. 1077.

(4) I.L.R. 24 Mad. 202.

*** The references to pages are to the pages in the 2nd Edition.**

On p. 43,* next after the paragraph ending with the words "its works," insert the following fresh paragraph :—

In *Clippens Oil Co.* v. *Edinburgh & District Water Trustees*(1) a Town Water Company, under a Statute authorizing them to lay a pipe through land for conducting water from a spring to the town, making satisfaction to the owners and occupiers of the land in manner directed by the Act, had laid the pipe in 1823, and it had ever since been used for so conducting water, without hindrance, down to 1898, when the suit was brought, but there was no proof that the water company had made payment or other satisfaction to the defendants' predecessor in title, through whose land part of the pipe had been laid. The House of Lords held (1) that from the long-continued undisputed maintenance and user of the pipe it must be presumed that the requirements of the Statute as to such satisfaction (and otherwise) had been duly complied with, and (2) that the right conferred by the Act on the water company, under compulsory powers, to lay the pipe carried with it, by implication, the right to support of the pipe from the subjacent land,—the House of Lords, on this point, approving and resting on the principle laid down in *L. & N. W. Ry. Co.* v. *Evans*(2).

On p. 45,* next after the paragraph ending with the word "damage", insert the following fresh paragraphs :—

Wherever the Legislature has authorized a landowner to make a particular use of his land or to do certain acts which he would not otherwise be entitled to do for the more beneficial enjoyment of his land, if, according to the sound construction of the statutory enactment or enactments in question, the authority given is permissive merely and not imperative, the Legislature must be held to have intended that the use or acts sanctioned are not to be made or done if

(1) L.R. [1904] A. C. 64.
(2) L.R. [1893] 1 Ch. 16.

***The references to pages are to the pages in the 2nd Edition.**

the making or doing thereof would be in prejudice of the common law rights of other landowners, by causing a nuisance to them or otherwise injuring and causing substantial damage to them in respect of their "natural" or common law rights as landowners(1). Thus, in *London, Brighton, & S. C. Ry. Co.* v. *Truman*(2) the defendants, the railway company, under statutory power, purchased a piece of ground adjoining one of their stations for the purpose of receiving and keeping cattle or any goods conveyed or to be conveyed on the railway, and used it as a yard for that purpose. The noise made by the cattle and drovers and by the loading and unloading of the former, by day and by night, caused a nuisance to the plaintiffs, certain occupiers of adjacent houses, which, it was not disputed, would, but for the Statute, have been actionable. It was found as a fact, and not disputed before the House of Lords, that there was no negligence on the part of the defendants in their use of the cattle yard. The House of Lords held that, the company having been authorised by their special Act to acquire, in such place as they should deem eligible, and use, a piece of land for purposes directly connected with and incidental to the general traffic of their railway, and having done so, the yard became part of the entire railway and its appurtenances, and the provisions of the Act relating to its acquisition and use, as being for the benefit of the public and notwithstanding they might occasion a nuisance, were intended by the Legislature to be imperative, similarly as those relating to the construction and use of the railway, and that the company were therefore entitled to the same immunity from liability to an action for nuisance occasioned by their acquisition and use of the yard for the purposes authorised as railway companies are for nuisances occasioned by their use of their

(1) *Canadian Pacific Ry. Co.* v. *Parke*, L.R. [1899] A. C. 535, 544, 545. See also notes on this and other cases in commentary on section 7, in Supplement.

(2) L.R. 11 A. C. 45. See also *Canadian Pacific Ry. Co.* v. *Parke*, L. R. [1899] A. C. at pp. 546, 548.

railways,(1) provided they were not guilty of negligence; and the prohibitory injunction applied for by the plaintiffs was disallowed. In effect, the defendants had acquired, by statutory power, an easement restricting the plaintiffs in respect of the right specified in *Illustration* (*c*) to section 7 of this Act. On the same principle, in *Managers of Metropolitan Asylum District* v. *Hill*(2) the defendants, who were empowered by a Statute to build and use hospitals for the sick poor of the metropolis, were held not to be protected from liability to the plaintiffs' action for a nuisance caused by a small-pox hospital erected by the defendants in proximity to houses occupied by the plaintiffs, because the statutory power was not imperative but permissive. So, in *Canadian Pacific Ry. Co.* v. *Parke*,(3) in which the defendants, as owners of land in a district in which irrigation was indispensably necessary in order to develop the fertility of the soil, were empowered by certain enactments of the legislature to divert water from any neighbouring stream or lake and convey it through land not belonging to them by ditches to their own land for the purpose of irrigation, and had so diverted and conveyed water to their land and irrigated it therewith, and owing to the porous character of the soil the water percolated into the adjoining land of the plaintiffs, and caused a landslip therein and consequent substantial damage to the plaintiffs, the Judicial Committee held that the statutory provisions under which the defendants had acted were permissive merely, and not imperative, and that therefore the defendants, whether they were guilty of negligence or not, were not protected from liability by the legislature, and an injunction was therefore granted restraining them from so irrigating their land as to cause a

(1) See *Rex* v. *Pease*, 4 B. & Ad. 30; 38 R. R. 207; *Vaughan* v. *Taff Vale Ry. Co*, 5 H. & N. 679; *Hammersmith Ry. Co.* v. *Brand*, L.R. 4 H. L. 171; *Canadian Pacific Ry. Co.* v. *Roy*, L.R. [1902] A. C. 220; *Geddis* v. *Proprietors of Bann Reservoir*, L.R. 3 App. Cas. 430, 438; *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*, I.L.R. 27 Bom. 344.

(2) L.R. 6 A. C. 193 (H. L.).

(3) L.R. [1899] A. C. 535.

landslip and consequent injury to the plaintiffs. In *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*,(1) the defendants, the Trustees of the Madras Harbour, a body created by an Act for the express purpose of regulating, conserving, and improving a harbour, which had already been partially made by the Government by means of two groynes run out into the sea from the foreshore, maintained, and made some further extension of, the groynes. The result of the construction of these groynes had been to cause an encroachment of the sea on the coast to the north of the harbour, and this encroachment had been going on up to, and continued progressively after, the time when the harbour and the works appertaining thereto had become vested in the defendants under the Act and after the extension of the groynes by them, and resulted in the submergence and washing away of a portion of the plaintiff's land and damage to his buildings thereon. The Act contained no provision for compensation being made by the defendants for any damage which might result to any person from the construction and maintenance of the groynes or other works of the harbour, nor for the construction by the defendants of any works to protect private owners from any such damage; but it contained a provision protecting the defendants, and their officers or servants, from liability in damages for any act *bonâ fide* done by them in pursuance of the Act. It was not alleged that the defendants had done anything which they were not entitled to do under the Act, but that they were guilty of an omission of duty, the plaintiff's contention being that a common law liability, from which they were not saved by the Act, lay upon the defendants to take preventive measures, by executing such works as might be necessary, against damage being caused to landowners by the construction or maintenance of the groynes or other works of the harbour; in default, to pay compensation for any such damage. It was held that the defendants were

(1) I.L.R. 23 Mad. 389.

not subject to any such liability, and that the plaintiff had no cause of action against them.

Where, by Order of the Board of Trade confirmed by the Legislature, a Town Corporation was empowered to supply the town with electricity for lighting and other purposes, but it was expressly provided in the Order that nothing therein should exonerate the Corporation from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by the Corporation, the Corporation was held to be liable for damage caused to property in the plaintiffs' premises situate in the town by a leakage of electricity from one of the mains laid down by the Corporation, even supposing there had been no want of care and skill on the part of the Corporation in executing and maintaining the electrical works in accordance with the Order.(1)

Where the question arises, on the construction of a Statute, whether it has taken away, or has imposed restrictions on, rights of private proprietors, if the Act contains no provision for compensation for such loss, or curtailment, of rights, the absence of such provision raises a presumption, not incapable however of being rebutted, that the legislature did not intend to take away, or restrict, such rights. In *Musselburgh Real Estate Co.* v. *Provost, &c., of Musselburgh*(2) Lord Halsbury L. C., after remarking that it is contrary to the policy of Parliament to take away rights of property without giving compensation therefor, said: "But I think, on the other hand, it must be frankly admitted that where you are dealing with public necessities and public security, Parliament does sometimes do that"; and in that case the House of Lords held that a Harbour Act had, for the public

(1) *Midwood & Co., Ld.* v. *Manchester Corporation*, L.R. [1905] 2 K. B. 597. See also *Shelfer* v. *City of London Electric Lighting Co.*, L.R. [1895] 1 Ch. 287.

(2) L.R. [1905] A. C. 491. See also judgment of Bowen L. J., in *London and North Western Ry. Co.* v. *Evans*, L. R. [1893] 1 Ch. 16, 27. But see, on the other hand, observations of Lord Bramwell L. J. in *Wells* v. *London, Tilbury and Southend Ry. Co.*, L.R. 5 Ch. D. 126, 130.

benefit, taken away the right of the defendants, as owners of the foreshore and of land abutting on it, opposite the harbour constructed under the Act, to dig and take away sand, gravel, &c., from the foreshore, except so far as the Harbour Commissioners might in their discretion permit them to do so, although no compensation for such loss by the defendants of property rights was provided by the Act, unless and except so far as the advantage of having a harbour adjoining their lands might be regarded as an intended compensation.

Where a railway company entitled to act, acts, under the power given by the Railways Clauses Consolidation Act, 1845, s. 78, to prevent the owner, lessee, or occupier of mines or minerals subjacent, or adjacent, within the prescribed distance, to their railway, from working or getting those mines or minerals, by paying him compensation therefor, the company do not thereby become the owners of those minerals or mines, nor of the mining rights: the mines or minerals still remain the property of the person who was the owner thereof before the company exercised this power, though he (or the lessee, or occupier thereof) is thereby deprived of the right to work or get them: the transaction is not a sale to the company of the minerals or mines, nor even of an easement of support, though by giving the company the right to have the minerals, which are, or may possibly be, necessary for the support of the railway, left untouched, it substantially and in effect secures to them such an easement.(1) Similarly, where under the Waterworks Clauses Act, 1847, s. 22, a waterworks company exercises the power of preventing the owner, lessee, or occupier of mines or minerals under, and within a prescribed distance from, the company's works from working or getting them, paying him compensation therefor, there is no purchase by, nor transfer of the property in the minerals or mines to, the

(1) *Great Northern Ry. Co.* v. *Inland Revenue Commissioners*, L.R. [1901] 1. K. B. 416; [1899] 2 Q. B. 652. See also *Errington* v. *Metropolitan District Ry. Co.*, L.R. 19 Ch. D. 559, 569, 575.

company: they remain vested in that owner, but with the restriction precluding him (or the lessee, or occupier) from exercising the ordinary right of a proprietor (or lessee or occupier) to get and work them,(1) the company virtually acquiring a right of support to their waterworks as dominant tenement.

Where an Inclosure Act directed that a portion of certain land, of which W was the owner and over which other persons had rights of common, should be allotted to W, and the remainder of it to the commoners, but reserved to W the mines lying within or under the land allotted to the commoners and the enjoyment of those mines, and provided that in case he should work any of those mines he should make satisfaction for the damage and spoil of ground occasioned thereby to the person or persons in possession of such ground, it was held that the Act conferred on W, as incident to the enjoyment of the mines, all powers reasonably required for digging and carrying away the minerals, including the right to sink shafts in the land wherein and whereunder those mines were, though it might be possible for him to work those mines from his own allotment.(2)

On p. 47,* next after the word "orally," at the end of a paragraph, and in continuation of that paragraph, insert the following:—

By the Scottish law a grant of a servitude is not required to be made by deed or instrument under seal; the grant must be in writing, and in order to be binding on the singular, as well as the universal, successors of the granter, recorded in the Register of Sasines, or, if not so recorded, followed by user.(3)

(1) *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* v. *Pontypridd Waterworks Co.*, L.R. [1903] A C. 426 (H.L.).

(2) *Hayles* v. *Pease and Partners, Ld.*, L.R. [1899] 1 Ch. 567.

(3) Erskine's Principles of the Law of Scotland, 204 (18th Ed.); *North British Ry. Co.* v. *Park Yard Co.*, L.R. [1898] A. C. 643, 647, 653, 658.

* The references to pages are to the pages in the 2nd Edition.

On p. 47,* next after the paragraph ending with the words "servient owner," insert the following fresh paragraph :—

The law of India, so far as the Transfer of Property Act extends, regarding contracts or covenants imposing restrictions on the user of land (or other immoveable property), but not creating easements, is laid down in section 40 of that Act.(1)

On p. 47,* for the words "alienability or alienability" (an erratum) substitute "alienability or inalienability."

On p. 47,* next after the paragraph ending with the word "itself," insert the following fresh paragraph :—

By the English law, a railway company has not such an interest in its land as to entitle it to alienate, or to grant a right of way or other easement over, any portion of it (except "superfluous" land within s. 127 of the Lands Clauses Act, 1845, or land taken up for "extraordinary purposes" within s. 45 of the Railways Clauses Act, 1845) for any purpose other than the purposes of the company's statutory duties and powers, which are public purposes; the construction

(1) By the English law, when the benefit of such a covenant has been once clearly annexed to land belonging to the covenantee, there is a presumption that it passes by an assignment of that land and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. His ignorance of the existence of the covenant does not defeat the presumption (*Rogers* v. *Hosegood*, L.R. [1900] 2 Ch. 388, 407, 408). "The benefit" (of a restrictive covenant) "may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees" of the two plots, "subject, in the case of the burden, to proof that the legal" (as distinguished from the equitable) "estate, if acquired, has been acquired with notice of the covenant." (Judgment of C. A. in same case, L.R. [1900] 2 Ch. at p. 406). When, on the sale by a landowner of the whole of his land, the purchaser enters into a covenant restricting the user of the land, the administratrix of the vendor cannot maintain a suit, against an assignee of the land from the purchaser, for a breach of the covenant committed after the vendor's death; there having been no land to which the benefit of the covenant could be annexed, and the covenant being therefore necessarily, so far as the vendor was concerned, a merely personal covenant (*Formby* v. *Barker*, L.R. [1903] 2 Ch. 539, 554).

*** The references to pages are to the pages in the 2nd Edition.**

of a railway for the use of the public being the sole purpose for which the company is allowed to acquire the land compulsorily.(1)

On p. 50,* next after the words "done so," at the end of a paragraph, insert, in continuation of that paragraph, the following:—

See also in notes to section 7, *Illustration* (*e*).

On p. 50,* to footnote (2) add the following:—

New Sharlston Collieries Co., Ld. v. *Earl of Westmorland*, L.R. [1904] 2 Ch. 443.

and next after the reference to *Caledonian Ry. Co.* v. *Sprot*, in footnote (3), insert the following:—

Robinson v. *Grave*, 21 W. R. 223; 27 L. T., N. S. 648.

On p. 52,* next after the words "compulsory powers," insert "(*a*)," as a reference letter to a fresh footnote, and at foot of the page insert the following fresh footnote:—

(*a*) See observations of Lord Westbury in *G. W. Ry. Co.* v. *Bennett*, L.R. 2 H. L. at p. 42, and of Lord Watson in *Lord Provost and Magistrates of Glasgow* v. *Farie*, L.R. 13 A. C. at pp. 675, 676.

On p. 55,* next after the words "yearly renewed," insert, as part of the same paragraph, the following:—

In *Chinnappa Mudaliar* v. *Sikka Naikan*(2) the plaintiff, a rayat holding Government lands, the cultivation of which depended upon a supply of water from a Government irrigation channel, had sustained damage to his crops by the negligence of the defendant, a Government Revenue Officer, in closing the channel 15 days earlier than the date on which it was his duty according to the annual practice to close it. It was held that the plaintiff's right to have a

(1) *Mulliner* v. *Midland Ry. Co.*, L.R. 11 Ch. D. 611; *Great Western Ry. Co.* v. *Talbot*, L.R. [1902] 2 Ch. 759, at p. 765. As to the extent of the right of way over a public railway to which the owner of land, through which the railway is made intersecting it, is entitled, see note to section 28 thereon in Supplement.

(2) I.L.R. 24 Mad. 36.

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supply of water from the channel to his lands at a certain time of the year was not an easement, and therefore did not give him a right of action against any person whomsoever who disturbed it, but that it was a right based on a contract between the Government and him, which, if it was infringed by the negligence of a servant of the Government, acting as such, gave him a right of action against the Government, but not against the servant. The Court relied on *Krishna Ayyan* v. *Venkatachella Mudali*,(1) as authority for their decision. A covenant for quiet enjoyment contained in a lease of a house, entitles the lessee, as such, to a right to the free passage of air over an adjoining piece of vacant land belonging to the lessor and not leased, precluding the lessor from so building thereon as to interfere with such free passage of air and thereby prevent smoke from issuing from the chimneys of the house and drive it down them into the rooms of the house.(2) This, of course, is not an easement, but only a right against the covenantor and his successors in title.

On p. 65,* next after the paragraph ending with the words "to section 13," insert the following fresh paragraphs:—

A grant of a right of way, to and from the dominant tenement, to the grantee, "his executors, administrators, and assigns, undertenants and servants," for all purposes connected with the use and enjoyment of the tenement, extends to persons using the way as licensees of the grantee (or his successor in title) for such a purpose.(3)

Reservation or re-grant of right of way.

In *May* v. *Belleville*,(4) in 1902 the defendant, the owner of two adjoining farms, called Coxhill and White Lodge, had entered into an agreement in writing to sell White Lodge to J, and in pursuance thereof a deed of conveyance of White Lodge had been engrossed. The deed of convey-

(1) 7 Mad. H. C. R. 60.
(2) *Tebb* v. *Cave*, L.R. [1900] 1 Ch. 642.
(3) *Baxendale* v. *North Lambeth Liberal & Radical Club, Ld.*, L.R. [1902] 2 Ch. 427.
(4) L. R. [1905] 2 Ch. 605.

*** The references to pages are to the pages in the 2nd Edition.**

ance contained a reservation to the vendor, "his heirs and assigns, the owners and occupiers for the time being" of Coxhill, "and their servants and others authorized by them," of "all rights of way hitherto exercised in respect of" Coxhill over White Lodge. The agreement for sale contained a reservation of such rights of way in similar terms. The agreement had been signed by J's agent on his behalf, but the deed of conveyance (which had been signed by the defendant) had not been signed by J or his agent. For 35 years immediately preceding the date of the sale there had been unity of ownership of Coxhill and White Lodge, and the tenant of Coxhill had been regularly and systematically using a track or road which crossed White Lodge for passing from Coxhill to a certain public road and *vice versâ*. J had taken possession of White Lodge under the deed of conveyance. The plaintiff was the transferee from D of a mortgage of White Lodge which J executed in favour of D. It was held that, under these circumstances, J was, on the principle of the decisions in *Kay* v. *Oxley*(1) and *Bayley* v. *G. W. Ry. Co.*,(2) in equity bound by the reservation to the defendant of the right of way over White Lodge which had been exercised over it during the unity of ownership of that farm and Coxhill, and that the plaintiff necessarily had notice of that reservation, in the deed of conveyance, and was therefore bound by it equally as J was.

On p. 65,* next after the paragraph ending with the words "reservations (or re-grants)," insert the following fresh paragraphs:—

On the other hand, unless it is made clear by the wording of the instrument that the successors in title of the grantors are bound, as well as the grantors, it may be a difficult and doubtful question whether what was granted by the instrument was an easement or only a right against

(1) L. R. 10 Q.B. 360.
(2) L. R. 26 Ch. D. 434.

*** The references to pages are to the pages in the 2nd Edition.**

the grantors personally, as was the case in *North British Ry. Co.* v. *Park Yard Co.*,(1) in which the Court of first instance and the Court of Appeal in Scotland held that by the two instruments, the effect of which was in question, what had been granted by certain parties thereto to the railway company imposed only an obligation on those grantors personally, and did not affect their singular successors, but these decisions were reversed by the House of Lords, the majority of whom, Lord Morris dissenting, held that what had been granted was a servitude binding on the singular successors of those grantors.

In the same case it was held(2) that where the effect of an agreement in writing was to grant a servitude of way to and from a tenement, which, in the contemplation of all or even some of the parties to the agreement, was to be acquired or constructed by the grantee, the fact of the tenement not having been acquired or constructed by them at the date of the agreement could not, after it had been acquired or constructed by them, prevent the right of way from becoming attached to it as dominant tenement, provided the right of way was so used as to give reasonable notice of the burden to any person in whom the land subject to the burden might subsequently become vested.

Where the grantor of a several fishery—whether an incorporeal right to fish in certain waters, or a right to fish therein incident to the grant being of the soil thereunder—had, at the time of the grant, no title to a fishery in a portion of the entire extent of water over which the right purported to be granted, the grant may be a valid grant to the extent of such portion of the waters as the grantor was entitled to a fishery in, though invalid as to the remainder(3).

(1) L.R. [1898] A.C. 643.

(2) L.R. [1898] A.C. 643, 652.

(3) *Hanbury* v. *Jenkins*, L.R. [1901] 2 Ch. 401, 419; and see observations of Lord Selborne, L. C., in *Neill* v. *Duke of Devonshire*, L. R. 8 App. Cas., at p. 143.

Section 13.

On p. 77,* next after the words "railway for that purpose," insert, as part of the same paragraph, the following :—

In *Union Lighterage Co.* v. *London Graving Dock Co.*(1) the owners of two pieces of riverside land transferred one of them to the plaintiffs, retaining the other. At the time of the transfer there was a dock made of timber on the latter piece of land, which was supported by tie-rods extending through the soil of the former piece of land for some 15 feet. The conveyance to the plaintiffs contained no mention of any reservation of a right of support. It was found proved, and not contested,(2) that for such a timber-made dock it was reasonably necessary to have underground tie-rods extending beyond the dock premises and as far into the plaintiffs' premises as these rods extended, but that if the side of the dock so supported, instead of being made of timber, had been made of concrete, it would not have been necessary to place supporting rods extending beyond the limits of the piece of land on which the dock was constructed; and Stirling L.J. said:(3) "In my opinion an easement of necessity such as is referred to" (in passages in *Wheeldon* v. *Burrows*(4) quoted by him, referring to implied reservations of easements of necessity,) "means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. In *Wheeldon* v. *Burrows*(4) the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its present condition; but

(1) L. R. [1902] 2 Ch. 557; [1901] 2 Ch. 300.
(2) See L.R. [1902] 2 Ch. at pp. 559, 560.
(3) L.R. [1902] 2 Ch. at p. 573.
(4) L.R. 12 Ch. D. 31.

* The references to pages are to the pages in the 2nd Edition.

the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them." So, in *Ray* v. *Hazeldine*,(1) where the access of light to the only window of a pantry in the defendant's house was completely blocked by the erection of a wall by the plaintiff close to it, rendering the pantry useless as a pantry, but it was proved that it could be used for other purposes by making a window in the wall dividing it from another room and thus obtaining borrowed light through that room, it was held that the defendant's claim to an implied reservation to him of a right to the access of light to the pantry window as an easement of necessity was not maintainable, though the light was necessary to the use of the pantry *as a pantry*, and that therefore the plaintiff, who was the successor in title of the grantee from the defendant of the premises on which the wall had been erected, was entitled to erect it, (no express reservation of a right to light to the window having been made by the defendant, and a prescriptive right thereto not having been acquired by him).

On p. 78,* next after the words "belonging to him," insert, as part of the same paragraph, the following:—

And the fact that the enjoyment of a way or other *quasi*-easement at the time of the conveyance was permissive and precarious is immaterial; if it was (at that time) in fact enjoyed, the right to the way, or other easement, passes, under the terms of this enactment, by the conveyance, to the transferee none the less because the enjoyment was under and by virtue of a license or permission from the owner of the *quasi*-servient tenement,—as may be the case where, at and previously to the time of the conveyance, the transferor was not in possession of the property which was transferred by the conveyance as well as of the *quasi*-servient property, but the transferee was in possession of the former

(1) L.R. [1904] 2 Ch. 17.

*The references to pages are to the pages in the 2nd Edition.

property as the tenant of the transferor.(1) And where a mortgagee, under the power of sale which he has by s. 19 of the Conveyancing and Law of Property Act, 1881, sells a part of the mortgaged property, the conveyance to the purchaser (provided no contrary intention is expressed in it) operates, similarly as a conveyance of a part of his property by the owner, to give to the transferee, by virtue of s. 6 of that Act, any easement over the unsold portion of the property which was at the time of the conveyance enjoyed as an apparent and continuous *quasi*-easement over it for the beneficial enjoyment of the portion conveyed or any part thereof (as, *e.g.*, a *quasi*-easement of light)(2).

On p. 78,* next after the paragraph ending with the words "note to s. 19," insert the following fresh paragraphs :—

In *Burrows* v. *Lang*,(3) in 1886 the then owner of two adjoining properties, one of which was a farm, conveyed the farm to the plaintiff. On the other property a watercourse, and a pond supplied with water thereby, had been made more than a century before the suit, which was brought in 1900, for the purpose of a mill situate on that property, water being diverted from a natural stream through the watercourse to the mill and then returned to the stream. From 1831 to 1886, during which period the two properties had belonged to common owners of both, the cattle of the farm used to drink water from the pond, part of which abutted on the farm land. Having regard to the fact that the watercourse and pond lay entirely on the mill property and had been made solely for the purpose of the mill, which was a temporary purpose, since the owner of the mill could, whenever he might choose to do so, cease to use the mill, and that therefore, supposing there had not been unity of ownership of the two properties, no prescriptive easement to use the

(1) *International Tea Stores Co.* v. *Hobbs*, L.R. [1903] 2 Ch. 165.
(2) *Born* v. *Turner*, L. R. [1900] 2 Ch. 211.
(3) L. R. [1901] 2 Ch. 502.

* The references to pages are to the pages in the 2nd Edition.

water of the pond for the farm cattle could have been acquired, and such user would have been *precario*, Farwell J. held that no easement to compel the owner of the mill property to continue to keep the pond supplied with water by the watercourse for the use of the plaintiff's farm cattle, nor any right even to use water if and when there might be any in the pond, passed to the plaintiff, on the conveyance to him of the farm, either under the Conveyancing and Law of Property Act, 1881, s. 6, or by implied grant.

On the grant of a house, no grant of an easement of light can be implied as having been made to the grantee of the house over adjoining land not granted to him, unless the grantor had at the time of the grant of the house such an interest in that adjoining land as would have empowered him to make an express grant of that easement. Where C, the lessee of a plot of land and a house built thereon, assigned the lease of the plot and house to Q, and at the time of the assignment C was entitled under an agreement between him and E, the owner of an adjoining plot, to obtain, if and when certain conditions were fulfilled by C, a lease from E of the latter plot, but had, at that time, no existing title thereto or interest therein as lessee or otherwise, it was held that no right to access of light over that adjoining plot to the windows of Q's house overlooking it passed to Q by implication, under the doctrine that a grantor cannot derogate from his own grant, or under section 6, sub-section 2, of the Conveyancing and Law of Property Act, 1881.(1)

On p. 78,* to footnote (3) add the following:—

International Tea Stores Co. v. *Hobbs*, L. R. [1903] 2 Ch. 165, at p. 173; *Ram Narain Shaha* v. *Kamala Kanta Shaha*, I.L.R. 26 Calc. 311.

On p. 82,* next after the words "and the suit was dismissed," insert, as part of the same paragraph, the following:—

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(1) *Quicke* v. *Chapman*, L. R [1903] 1 Ch. 659.

*** The references to pages are to the pages in the 2nd Edition.**

With reference to the provision in section 6, sub-section 2, of the Conveyancing and Law of Property Act, 1881, that a conveyance of land having houses or other buildings thereon shall be deemed to include (*inter alia*) all lights, liberties, privileges, and advantages whatsoever, at the time of the conveyance enjoyed therewith, unless a contrary intention is expressed in the conveyance, Cotton L. J., after referring to the facts that the house on the piece of land leased to the plaintiffs had at the time of the conveyance to them only recently been erected, and that it was known to them at that time that the entire tract of land of which the piece leased to them formed a part was being laid out under the above-mentioned building scheme, said: "The light did in fact at the time come over that building, but it came over it under such circumstances as to shew that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period; and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section. That expression must mean not light which a person has a right to under the statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment of that light would be continued, and that it would not be simply precarious."(1) This case was followed in *Godwin* v. *Schweppes, Ld.*,(2) in which the facts were, substantially, similar to those of the former case.

On p. 83,* next after the words "that Act" at the end of a paragraph, insert, in continuation of the same paragraph, the following:—

In *Pollard* v. *Gare*(3) the co-owners of land fronting the towing-path of a river, which they proposed to sell or let for building purposes in plots, each having a frontage to the

(1) L. R. 38 Ch. D. [1888], at pp. 307, 308.
(2) L. R. [1902] 1 Ch. 926.
(3) L. R. [1901] 1 Ch. 834.

* The references to pages are to the pages in the 2nd Edition.

towing-path of 66 feet and extending backwards from the towing-path for about four times that length, entered into an agreement in writing with H that H should within a specified time build upon two of the plots, adjoining one another, a house of a specified character, and that upon this being done and in consideration thereof they would grant to H a specified lease of those two plots and the house thereon. The agreement was entered into by the parties with reference to a plan shewing all the building plots, with a building frontage line marked thereon extending through all the plots at a distance of about 20 feet from their frontage boundary line. The agreement imposed no restriction on H as to the position in which the house was to be erected on the plots the subject of the agreement except that she was not to erect any building within 20 feet of their front boundary line. H built the house in accordance with the agreement, and the stipulated lease was granted to her by the owners. It was held that, though the grantors of the lease retained under the agreement the right to build on the other plots, they (and their assigns) were not entitled to erect on a plot adjoining the land the subject of the lease a house in such a position as to interfere with the access of light to H's house, there being in the agreement no reservation to them of a right so to do; and the case was held to be covered by the decision in *Broomfield* v. *Williams*(1). The legal position of the parties was held to be the same, whether their rights were treated as fixed by the agreement or by the lease, because, treating them as fixed by the former, the doctrine that a grantor cannot derogate from his own grant must, it was held, be applied to the land the subject of the agreement not as vacant land (as it was at the date of the agreement) but as land with the house on it, built in accordance with the contract, which must, for this purpose, be taken to have been fulfilled(2). It was further held that the general words in section 6, sub-section 2, of the Conveyancing and

(1) L. R. [1897] 1 Ch. 602.

(2) L. R. [1901] 1 Ch. at p. 840.

Law of Property Act, 1881, must be read into the lease, there being nothing to shew an intention to the contrary—here, again, *Broomfield* v. *Williams*(1) was referred to as authority—and that upon this ground also H was entitled to a right to light in respect of her house which would be infringed by the adjoining plot being so built on as to obstruct it(2).

On p. 83,* to footnote (2) add the following :—

Union Lighterage Co. v. *London Graving Dock Co.*, L. R. [1902] 2 Ch. 557; *Ray* v. *Hazeldine*, L. R. [1904] 2 Ch. 17 and to footnote (3) on the same page (p. 83)* add the following :—

Union Lighterage Co. v. *London Graving Dock Co.*, L. R. [1902] 2 Ch. 557; [1901] 2 Ch. 300; *Ray* v. *Hazeldine*, L.R. [1904] 2 Ch. 17. (See the notes on these last two cases in Supplement).

On p. 85,* next after the word "operation" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

Where, in a Bengal case, a partition was effected under and in pursuance of a consent decree, passed in a suit brought by one of two joint owners of a plot of land and a house thereon against the other for a partition, it was held that the rule of the English law as to grants of continuous and apparent easements impliedly made on the severance of a tenement ought to be applied, as being in accord with "justice, equity, and good conscience," and that therefore the plaintiff was entitled to the same access of light and air passing over the defendant's portion of the plot and house to certain windows and doors in the plaintiff's portion of the house as those windows and doors enjoyed at and before the time of the partition, though nothing was expressed in the decree as to any such right(3). It was unnecessary to decide, nor did the Court express an opinion on, the question

(1) L. R. [1897] 1 Ch. 602.

(2) L. R. [1901] 1 Ch. at p. 841.

(3) *Kadambini Debi* v. *Kali Kumar Haldar*, I.L.R. 26 Calc. 516.

* The references to pages are to the pages in the 2nd Edition.

whether the implication of a grant of such an easement would also exist if the partition decree were passed in a contested suit. Nor was this question decided in *Bolye Chunder Sen* v. *Lalmoni Dasi*(1), a Bengal case which turned on a decree previously passed in a partition suit, which appears to have been contested, it being unnecessary to decide the question, inasmuch as that decree expressly determined the extent to which the defendant was entitled to build on his portion of the partitioned premises, and, by consequence, the extent to which the plaintiff was entitled to access of light and air to openings in the building on her portion of those premises.

On p. 86,* next after the paragraph ending with the words "*inter vivos*," insert the following fresh paragraph :—

Transfers by operation of law.

The rules embodied in this section apply as well in cases of severance of property occurring by operation of law, as, *e.g.*, where on the death of an owner of a landed estate part of his estate passes by testamentary disposition to A, but the remainder, as to which there is an intestacy, passes by inheritance to B, or by escheat to the Crown, as in cases of such severance occurring on compulsory sales, for arrears of Government Revenue, or in execution of decrees for sale or money decrees, or under a power of sale, or under the Land Acquisition Act (2).

Section 15.

On p. 90,* to footnote (2) add the following :—

See also *Bright* v. *Walker*, 1 Cr. M. & R. 211; 40 R. R. 536 (1834).

On p. 91,* next after the words " in possession of both, impossible," convert the full stop into a comma and insert the following :—

the enjoyment during such possession not being an enjoyment of the benefit enjoyed "as an easement," but in right

(1) I.L.R. 14 Calc. 797.

(2) *E.g.*, see *Raja Suraneni Venkata Papayya Rau* v. *Secretary of State*, I.L.R. 26 Mad. 51; and *Illustration* (*l*) to this section.

*** The references to pages are to the pages in the 2nd Edition.**

of possession of the tenement itself subjected to the enjoyment.

On p. 91,* next after the paragraph ending with the word "property," insert the following fresh paragraph :—

In further explanation of the words "as an easement" in section 15, see section 4 and notes thereto.

On p. 91,* to footnote (2) add the following :—

Onley v. *Gardiner*, 4 M. & W. 496 ; 51 R. R. 704 ; *Battishill* v. *Reed*, 18 C. B. 696 ; *Damper* v. *Basset*, L. R. [1901] 2 Ch. 350 ; *Outram* v. *Maude*, L. R. 17 Ch. D. 391.

On p. 94,* to footnote (2) add the following :—

"Interruption," in sections 1, 2, and 3 of that Statute, does not, as is plain from section 4 thereof, include a voluntary intermission, on the part of the claimant, in the enjoyment : it "refers to an adverse obstruction, and not a mere discontinuance of user" (*per* Stirling J. in *Smith* v. *Baxter*, L. R. [1900] 2 Ch. 138, at p. 143).

On p. 96,* next after the word "defendants" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

In *Damper* v. *Basset*(1) it was held that if during the whole, or a part, of a period during which a way has been used over a person's land, the land has been in the possession of a tenant under him, the user of the way during the tenancy is ineffectual as against the landlord for the purpose of acquisition of a prescriptive right to the way, inasmuch as the landlord could not, during the period of the tenancy, maintain a suit for trespass or otherwise against the person so using the way.

On p. 97,* next after the words "*waste of labour and expense*," insert, as part of the same paragraph, the following :—

And in *Union Lighterage Co.* v. *London Graving Dock Co.*(2) Vaughan Williams L. J. said : "I agree, speaking of easements generally, that mere enjoyment is not sufficient to

(1) L.R. [1901] 2 Ch. 350 ; following *Baxter* v. *Taylor*, 4 B. & Ad. 72 ; 38 R. R. 227. See also section 16 and notes thereon.

(2) L.R. [1902] 2 Ch. at p. 568.

* The references to pages are to the pages in the 2nd Edition.

create the prescriptive right. This is only true in respect of the right to light. In order to gain for the owner of land by enjoyment a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the advantage must be one the enjoyment of which is, or ought to be, known to the neighbour, and could without destruction or serious injury to his own close be interrupted by him."

On p. 97,* next after the words "on *Explanation II*," insert the following fresh paragraph :—

"For twenty years."

The enjoyment for a period of twenty years, necessary to give a prescriptive title, under the English Prescription Act, 1832, has been held to mean enjoyment—of the character required—for twenty years continuously ;(1) and the English decisions, on this point, would seem to be applicable to cases under this Act or under the Indian Limitation Acts, the wording and provisions of these Acts being substantially the same as those of the English Statute, so far as this point is concerned. Thus, two periods of enjoyment, of the requisite character, broken by an intervening period during which the dominant and servient tenements were in the possession of the same person and during which therefore the enjoyment (not being enjoyment of the subject-matter "as an easement") was not of the required character, cannot be pieced together so as to constitute the twenty years enjoyment required to give a prescriptive title(2). In *Onley* v. *Gardiner*(3) Parke B., in the judgment of the Court delivered by him, said: "To hold that the words" ("actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years") "might be satisfied by an enjoyment for different intervals, which added

(1) *Onley* v. *Gardiner*, 4 M. & W. 496; 51 R R. 704; *Monmouthshire Canal Co.* v. *Harford*, 1 Cr. M. & R. 614; 40 R. R. 648; *Damper* v. *Bassett*, L. R. [1901] 2 Ch. 350.

(2) *Onley* v. *Gardiner*, 4 M. & W. 496; 51 R R. 704; *Battishill* v. *Reed*, 18 C. B. 696; *Damper* v. *Bassett*, L. R. [1901] 2 Ch. 350.

(3) 4 M. & W. at p. 500; 51 R. R. at pp. 707, 708.

* **The references to pages are to the pages in the 2nd Edition.**

together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which the presumption of a grant never could have existed before the Statute. For instance, if the occupier had used the road openly for a year or two, and then uniformly asked permission on each occasion, or only used it secretly and by stealth, for some years, and then resumed the enjoyment of it, no one would contend that a grant could have been presumed because the intervals of enjoyment united might amount to twenty years. A similar reason applies to intervals of unity of possession during which there is no one who could complain of the user of the road. It would be no answer to say that in one particular case, where the land over which the right is exercised is out on lease, the Legislature had provided for the non-continuity, if I may so say, of one of the periods mentioned in the Act; but in truth it has not so provided, for the effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned."

On p. 97,* to footnote (5) add the following :—

Union Lighterage Co. v. *London Graving Dock Co.*, L. R. [1902] 2 Ch. 557; [1901] 2 Ch. 300.

On p. 102,* next after the words "*vi* (forcibly) also," insert, as part of the same paragraph, the following :—

In *Gardner* v. *Hodgson's Kingston Brewery Co.*,(1) in which the plaintiff had proved uninterrupted, peaceable, and open enjoyment by her and her predecessors in title, as owners of a certain tenement, of a way over the defendants' yard for more than forty years next before the suit, but an annual payment of 15*s.* had been made by her and them to the defendants and their predecessors in title for or in acknowledgment of, as the evidence was held to shew, a license to

(1) L. R. [1903] A. C. 229, 238, 239.

*** The references to pages are to the pages in the 2nd Edition.**

use the way renewed year after year during the whole of that period, and the plaintiff was held to have therefore failed to prove that she had enjoyed the way "as of right," Lord Lindley said: "I understand the words 'claiming right thereto'" (in section 2 of the Prescription Act, 1832) "and the equivalent words 'as of right,' which occur in section 5, to have the same meaning as the older expression nec vi, nec clam, nec precario." And Lord Davey, in the same case, said: "To quote the well-known formula, an enjoyment as of right must be nec vi, nec clam, nec precario. The appellant shews that the enjoyment has not been either vi or clam, but she fails to prove that it has not been precario."

On p. 102,* next after the paragraph ending with the word "redundant," insert the following fresh paragraph:—

Whether the enjoyment by the claimant of an easement has been permissive, terminable at the will of the owner of the burdened tenement either at any time or at the expiration of a year or other period or otherwise, or on the other hand has been exercised by the former claiming right to exercise it against the will of the latter, is sometimes a question of considerable difficulty, as depending on the facts and circumstances of the case. Where the plaintiff proved open, peaceable, and uninterrupted enjoyment by her and her predecessors in title, as owners of a tenement, of a way over the defendants' yard for more than forty years next before the suit, but an annual payment of 15*s.* had throughout that period been made by her and them to the defendants and their predecessors in title, but there was no evidence as to how either the use of the way or the annual payment originated; the evidence being, even on the most favourable view to the plaintiff of the inferences which could be drawn from it, equally consistent with the inference that the enjoyment was permissive, as having been by virtue of a license renewed annually in consideration of an annual payment of 15*s.*, as with the inference that it was as of

* The references to pages are to the pages in the 2nd Edition.

right, as having been by virtue of a lost grant of a right of way in consideration of a yearly rent-charge of 15*s.* on the plaintiff's tenement, the plaintiff was held to have failed to discharge the onus which lay on her to prove that the enjoyment was as of right, in order to establish her claim to the right of way either under the Prescription Act, 1832, or by the common law.(1)

On p. 102,* next after the words "also belonging to his landlord," insert, as part of the same paragraph, the following:—

This principle applies even in the case of a tenant having a permanent right of tenancy, such as an *osat* talukdar(2).

On p. 102,* in footnote (1), next after "*Daniel* v. *Anderson*, 31 L. J., Ch. 610," insert the following:—

Austin v. *Amhurst*, L. R. 7 Ch. D. 689, 692.

On p. 108,* against the word "Statute" place "(*x*)," as a reference to a fresh footnote, and before footnote "(1)" on that page insert the following fresh footnote:—

(*x*) See also *Janhavi Chowdhurani* v. *Bindu Bashini Chowdhurani*, I.L.R. 26 Calc. 593.

On p. 109,* next after the paragraph ending with the word "law," insert the following fresh paragraphs:—

In *Budhu Mandal* v. *Maliat Mandal*(3) the plaintiffs, who were rayats, for the purpose of irrigating their paddy fields, which lay on the North side of a river, used to construct a dam across the river, whereby the water rose and flowed over their western fields, and thence over land belonging to the 1st defendant, from which it passed on to the eastern fields of the plaintiffs, the water being prevented from flowing back into the river and caused to flow over the 1st

(1) *Gardner* v. *Hodgson's Kingston Brewery Co.*, L.R. [1903] A. C. 229, affirming the decision of the majority in the Court of Appeal (L. R. [1901] 2 Ch. 198), reversing the decision of Cozens-Hardy J. (L. R. [1900] 1 Ch. 592).

(2) *Mani Chander Chakerbutty* v. *Baikanta Nath Biswas*, I.L.R. 29 Calc. 363.

(3) I.L.R. 30 Calc. 1077.

*** The references to pages are to the pages in the 2nd Edition.**

defendant's land by some bunds erected by the plaintiffs. The 1st defendant's land consisted of railway cuttings and appears to have been lower than the plaintiffs' lands and to have been submerged by this flow of water over it. This diversion and discharge over the 1st defendant's land of the river water, which the plaintiffs claimed to have acquired a prescriptive right to make, had been begun by them at a date prior to 1873 and had been repeated by them, but only in years in which there was a drought, down to 1895, when the defendants cut the bunds. The Court of first instance found, and the finding appears to have been confirmed by the lower appellate Court, that there was no drought for 12 years out of the 25 years from 1873 to 1897, in which year the suit was brought. The user was held to be sufficient to establish the prescriptive easement claimed by the plaintiffs.

"For twenty years."

The fact that there has been enjoyment, of the prescriptive character, of the access to windows of A's building of light passing over B's land, uninterruptedly, for part of the twenty years period does not give A any right or interest in respect of such access of light. There is no such thing known to the law as an inchoate easement. Therefore a contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that a right to the access of light over that land to those windows exists, or even that the prescriptive period is running, and consequently the non-disclosure of a deed acknowledging that the vendor is not entitled to that light is no ground for refusing the vendor specific performance, or allowing the purchaser compensation, though it may be a ground for depriving the vendor of his costs.(1)

On p. 111,* to footnote (4) add the following:—

See also in Lindley L.J.'s Judgment in that case: p. 65.

(1) *Greenhalgh* v. *Brindley*, L.R. [1901] 2 Ch. 324, 328. See also *Bonner* v. *Great Western Ry. Co.*, L.R. 24 Ch. D. 1; *Boyce* v. *Paddington Borough Council*, L.R. [1903] 2 Ch. 556.

* The references to pages are to the pages in the 2nd Edition.

On p. 112,* next after the words "remain unaltered," insert, as part of the same paragraph, the following:—

So, too, in *Kilgour* v. *Gaddes*,(1) in which the plaintiff and the defendant were tenants respectively of two adjoining tenements under the same landlord, it was held that the defendant did not, and could not, by 40 years enjoyment of a way over the tenement occupied by the plaintiff, for drawing water at a pump situate thereon, acquire a right of way and of taking water under section 2 of the Prescription Act, 1832, inasmuch as the words "so enjoyed as aforesaid" in the latter portion of that section (as well as the terms of section 5) shewed that the enjoyment in the case of the 40 years period must be as of right, as in the case of the 20 years period, and inasmuch as such easements, if acquired by the defendant's enjoyment, would necessarily be acquired by the owner in fee of the tenement occupied by the defendant against the owner in fee of the tenement occupied by the plaintiff, so that, as the same person was owner in fee of both tenements, that person would acquire these easements against himself, which was a legal impossibility.

On p. 112,* next after the paragraph ending with the word "tenant," insert the following fresh paragraph:—

Question whether ownership or easement has been acquired.

The question not infrequently arises for decision whether the proper inference to be drawn from user which has taken place is that a prescriptive right of ownership of, or only an easement over, the land the subject of the user has been created. As to this see notes in commentary on section 4.

On p. 113,* next after the word "itself" at the end of a paragraph, insert, in continuation of that paragraph, the following:—

In *Janhavi Chowdhurani* v. *Bindu Bashini Chowdhurani*,(2) a suit for a declaration of the plaintiffs' right of way instituted on 25th November 1895, the plaintiffs were found to have proved that they had been in uninterrupted enjoy-

(1) L.R. [1904] 1 K.B. 457.
(2) I.L.R. 26 Calc. 593.

***The references to pages are to the pages in the 2nd Edition.**

ment, as of right, for twenty years up to April 1892, of the way over the defendant's land, to and from the plaintiffs' land, to which they claimed to have acquired a right of easement under s. 26 of Act XV of 1877, and no objection was taken, before the High Court, to this finding. In April 1892, the defendant had dispossessed the plaintiffs of their land. The plaintiffs had brought a suit under s. 9 of the Specific Relief Act to recover possession, and obtained a decree in execution of which they had been restored to possession of their land on 19th June 1895. Two days after this the defendant had obstructed the way. The plaintiffs had not used the way after the dispossession in April 1892. Under these circumstances, the Court of first instance and the lower appellate Court held that the plaintiffs' enjoyment of the way ought to be considered as having extended to within two years next before the institution of the suit, the actual user of the way being in abeyance, as the first Court expressed it, during the period that the plaintiffs were kept out of possession of the dominant tenement by the defendant, and they therefore decreed in the plaintiffs' favour. The High Court was of opinion that the circumstances did not justify the inference of a continued enjoyment by the plaintiffs of the way up to within two years next before the suit, and therefore held that the plaintiffs had failed to establish their claim under s. 26 of Act XV of 1877.

On p. 113,* next after the paragraph ending with the word "expired," insert the following fresh paragraph :—

The use of the definite article here, when no suit has been previously mentioned in the section, is curious. In the corresponding provision in the English Prescription Act, 1832, (section 4) the words are "some suit or action wherein," &c. In *Cooper* v. *Hubbuck*(1) the point arose for

"*the* suit wherein," &c.

(1) 12 C.B. (N.S.) 456. And referred to by Lord Macnaghten in his speech in *Colls* v. *Home & Colonial Stores, Ld.*, L.R. [1904] A.C. at p. 190.

*The references to pages are to the pages in the 2nd Edition.

decision, in reference to those words, whether the period of twenty years uninterrupted enjoyment, on the completion of which the right is to be deemed absolute, is the period next before any suit or action wherein the claim is for the first time in a Court of Justice brought into question, so that the question is decided once for all in that suit or action, or is the period next before each and every suit or action in which it may from time to time be brought into question. The majority of the Court, Erle C.J., Willes, and Byles, J.J., held that the former construction of those words of the section was the right construction, while Williams J. held the latter construction to be the right one. It is apprehended that the intention of the Indian Legislature was to adopt, in the enactment in section 15 of the Easements Act upon this point, a rule in conformity with what was held by the majority of the Court in *Cooper* v. *Hubbuck* to be the law on the point under the English Prescription Act, 1832, but it may be thought that the intention might have been better expressed.

On p. 116,* to footnote (1) add the following :—

And see *Greenhalgh* v. *Brindley*, L.R. [1901] 2 Ch. 324, at p. 327 ; in which case, however, the purchaser with notice of a deed embodying a consent or agreement within s. 3 of the Prescription Act was held to be entitled at any time to put an end to the operation of the deed by giving notice of repudiation to the person in whose favor the vendor had executed it.

On p. 117,* delete the paragraph beginning with the words "In *Sultan Nawaz Jung*" and the footnote belonging thereto, and substitute therefor the following :—

A promise made by A, the owner of a house, in a letter addressed to B, the owner of a house situate close to A's house, that whenever B, the top of whose house was then on a lower level than certain windows in that side of A's house which faced B's house, should raise his house to a greater

* The references to pages are to the pages in the 2nd Edition.

height, A should not raise any objection in respect of the said windows which might be "shut up," which promise was accepted by B in a letter of reply, was held to be an agreement which, under *Explanation I* of section 15 of the Indian Easements Act, prevented the plaintiff, A's successor in title to his house, from acquiring, by the enjoyment of the access of light and air to those windows over the top of B's house for a period of more than 20 years commencing at or about the time when the promise was made and continuing up to the date of institution of the suit, an easement of light and air in respect of those windows against the defendant, B's successor in title to B's house, and the defendant was therefore held entitled to raise his house, thereby blocking the access of light and air to those windows.(1)

On p. 118,* to footnote (2) add the following :—

Smith v. *Baxter*, L.R. [1900] 2 Ch. 138, 143; *Hollins* v. *Verney*, L.R. 13 Q.B.D. 304, 307.

On p. 125,* next after the word "gained" at the end of a paragraph, insert, in continuation of that paragraph, the following :—

Kay L. J. in *Cooper* v. *Straker*,(2) laid it down that the words "actually enjoyed" in s. 3 of the Prescription Act, 1832, do not mean continuous enjoyment. "If that had been the intention of the Statute," he said, "some such word as 'continuously' should be found in this section, and it might then be necessary to shew that the plaintiffs had never closed their shutters for a day during twenty years next before the action." With this ruling Stirling J., in *Smith* v. *Baxter*,(3) expressed his "entire agreement," and also expressed it as his opinion that the question whether there has been actual enjoyment for the prescriptive period

(1) *Sultan Nawaz Jung* v. *Rustomji N. B. Jijibhoy*, I.L.R. 24 Bom. 156 (P. C.); 20 Bom. 704; L.R. 26 I.A. 184.

(2) L.R. 40 Ch. D., at pp. 26 and following.

(3) L.R. [1900] 2 Ch. 138, 145, 146.

*** The references to pages are to the pages in the 2nd Edition.**

within the meaning of that section is one of fact to be decided on the circumstances of each case. In the last mentioned case, for more than a year in the latter part of the period of twenty years next before the suit, considerable portions of two of the three windows in respect of which the plaintiffs claimed to have acquired an easement of light under that enactment had been boarded over, the boarding (which had been put up by the plaintiffs) entirely excluding the light coming to those portions, and a considerable portion of the third one covered by shelving, the shelving, though causing a material obstruction to the passage of light coming to that portion, allowing a substantial amount of it to pass. The plaintiffs were carrying on their business as printers in the room to which the windows belonged during, as well as before, the time that they were so boarded over and covered respectively. The learned judge held that, as to the portions of the two windows which had been boarded over, the requirements of the section that the use of the light should have been actually enjoyed for the full period of twenty years had not, but that as to the portion of the third window which had been partially darkened by the shelving they had, been satisfied.

On p. 126,* in continuation of the paragraph ending with the word "suit," insert the following:—

A greenhouse has been held to be a "building" within the meaning of that enactment.(1)

On p. 131,* next after the paragraph ending with the word "decision," insert the following fresh paragraph:—

In *Union Lighterage Co.* v. *London Graving Dock Co.*(2), in 1877 the then common owners of two adjoining riverside properties transferred one of them, which was used as a wharf, to the plaintiffs, retaining the other, on which a graving dock had in 1860 been constructed. For the support

(1) *Clifford* v. *Holt*, L.R. [1899] 1 Ch. 698.
(2) L.R. [1902] 2 Ch. 557; [1901] 2 Ch. 300.

*** The references to pages are to the pages in the 2nd Edition.**

of the dock, the sides of which were made of timber, a number of rods or ties had in 1861 been placed, extending into the soil of the wharf premises, underground, to a distance of about 15 feet, and there fastened by nuts to piles. In 1886 the dock premises were transferred to the defendants' immediate predecessors in title. The conveyance of the wharf premises to the plaintiffs contained no express reservation of any right to support. It was found proved on the evidence, and these findings were not contested by the defendants-appellants,(1) that all that was visible of the rods and nuts was two of the nuts; that although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp-sheathing of the plaintiffs' wharf; and that the plaintiffs did not in fact become aware of the existence of the rods until 1900, when, in making some excavations in their wharf, they discovered them. The majority of the Court of Appeal (Romer and Stirling L.J.J.) held (Vaughan Williams L.J. dissenting), confirming the judgment of Cozens-Hardy J., that the enjoyment of the support to the defendants' dock from the rods fixed in the plaintiffs' land was not open, because, though there had been nothing surreptitious, no active concealment on the part of the defendants or their predecessors in title, the plaintiffs neither in fact knew nor had sufficient means of knowing of the existence of the rods, and that therefore the defendants had not, by their and their predecessors' enjoyment of the support for more than twenty years, acquired an easement of support by the rods, either under the Prescription Act or under the presumption of a lost grant. Romer L.J. said:(2) "On principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has

(1) L.R. [1902] 2 Ch. at pp. 559, 560.
(2) L.R. [1902] 2 Ch. at pp. 570, 571.

been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. And I think on the balance of authority that this principle has been recognised as the law, and ought to be followed by us. In support of this statement I do not think it necessary to do more than refer to those parts, which deal with this point, of the speeches made by Lord Selborne and Lord Penzance in the House of Lords in *Dalton* v. *Angus*,(1) and I gather that their views as there expressed on this point were not dissented from by the other members of the House who took part in the hearing of that case."

On p. 131,* to footnote (3) add the following :—

and see *Behari Lal* v. *Ghisa Lal*, I.L.R. 24 All. 499, at p. 500.

On p. 132,* next after the words " serve any useful purpose," insert, as part of the same paragraph, the following :—

The person whose property rights are thus invaded may either abate the nuisance by cutting off so much of the tree as overhangs his land, or, if the damage caused is substantial, sue for and obtain damages or an injunction, or both.(2)

On p. 132,* next after the words " imposed by it " at the end of a paragraph, and in continuation of the same paragraph, insert the following :—

If a person's land is penetrated by the roots of a tree growing on his neighbour's land, he is entitled to abate the encroachment by cutting off so much of the roots as encroaches on his land.(3) And, in *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*,(4) in which roots of trees planted by the defendants on their land close to the wall

(1) L.R. 6 App. Cas. 740.

(2) *Smith* v. *Giddy*, L.R. [1904] 2 K.B. 448; see also *Behari Lal* v. *Ghisa Lal*, I.L.R. 24 All. 499; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*, I.L.R. 31 Calc. 944.

(3) *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*, I.L.R. 31 Calc. 944, 948.

(4) I.L.R. 31 Calc. 944, 949, 950.

*** The references to pages are to the pages in the 2nd Edition.**

of a building on the plaintiffs' land were touching the foundation of the wall and damage had been, and was likely to be further, caused to the building thereby, it was held that the plaintiffs were entitled under section 55 of the Specific Relief Act to a mandatory injunction to remove, not merely the roots, but the entire trees themselves.

and next after this fresh passage, on p. 132,* insert the following fresh paragraph :—

Artificial watercourses.

The rights which in the case of a natural stream belong to every riparian owner, as a natural incident to such ownership,(1) do not belong to riparian owners in the case of an artificial watercourse whether it be a permanent or a temporary one. Any right which, in the case of an artificial watercourse, a riparian proprietor may have in respect of the use and the flow of the water of the stream, must be based on some grant or agreement, actual or presumed, or prescription.(2) But there may be cases, and *Baily & Co.* v. *Clark, Son and Morland*(3), was such a case, in which it is extremely difficult, or impossible, to ascertain whether a permanent watercourse, as to the origin of which there is no direct evidence, is a natural or an artificial stream. And in *Kensit* v. *Great Eastern Ry. Co.*(4) Cotton L.J., after pointing out that it is impossible to say that any natural rights can ever be acquired in an artificial cut, added: "Possibly after a length of time it might be difficult in some cases to say that a cut was not part of the natural stream." In the case of a permanent artificial watercourse, which had been in existence for at least four centuries, there was no direct evidence of the circumstances under which it had been made, but from the evidence which there was as to the user of the water of the stream by the

(1) See section 7, *Illustration* (*f*), (*h*), (*j*).
(2) *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, I.L.R. 4 Calc. 633; L.R. 4 App. Cas. 121, 126; *Baily & Co.* v. *Clark, Son & Morland*, L.R. [1902] 1 Ch. 649, 663, 664.
(3) L.R. [1902] 1 Ch. 649.
(4) L.R. 27 Ch. D. 122, at p. 134.

* The references to pages are to the pages in the 2nd Edition.

riparian owners it was held, by the Court of Appeal, that the proper inference was that the watercourse was originally made upon the terms, agreed upon by the riparian owners *inter se*, that they should all equally have the same rights of user of the water of the stream as they would have had if the stream had been a natural stream.(1)

On p. 134,* next after the words "into the plaintiffs' land," insert, as part of the same paragraph, the following:—

In *Burrows* v. *Lang*(2) a watercourse, which had more than a century before 1900, the year in which the suit was brought, been made by the owner of a mill upon his own land, and since its construction maintained, solely for the purpose of the mill, water being thereby diverted from a natural stream and conducted to the mill and then returned to the stream, was held, by Farwell J., to be a temporary watercourse. The learned judge said: "If a man makes a watercourse leading water to a mill-pond for the use of his own mill on his own land, that is a temporary purpose, as it is limited to the period for which he uses the mill."(3)

On p. 135,* next after the words "defined course" at the end of a paragraph, insert, in continuation of the same paragraph, the following:—

From user from time immemorial of the water of a permanent artificial watercourse, supplied with water from an artificial reservoir or tank situate on the servient owner's land, a legal origin to such user may, and in the absence of rebutting facts or circumstances, should be presumed; and the fact that the water so derived is surplus overflow or drainage from the reservoir and that the power of fixing the times for letting off the overflow or surplus water from the

(1) *Baily & Co.* v. *Clark, Son & Morland*, L.R. [1902] 1 Ch. 649. See also *Sutcliffe* v. *Booth*, 32 L.J., Q.B., 136. And see note to section 7, *Illustrations* (*h*) and (*j*), on artificial streams, in Supplement, and cases there cited.

(2) L.R. [1901] 2 Ch. 502.

(3) L.R. [1901] 2 Ch. 508.

* **The references to pages are to the pages in the 2nd Edition.**

reservoir resides with the servient owner is not inconsistent with the existence of such an easement being presumed.(1)

On p. 138,* to footnote (1) add the following:—

Attorney-General v. *Hotham*, 1 Turn. & R. 209; 24 R. R. 21; *Attorney-General* v. *Copeland*, L. R. [1902] 1 K.B. 690; *Mercer* v. *Denne*, L.R. [1904] 2 Ch. 534, 540, 556; [1905] 2 Ch. 538; *Clippens Oil Co.* v. *Edinburgh and District Water Trustees*, L.R. [1904] A.C. 64; *Bhola Nath Nundi* v. *Midnapore Zemindari Co.*, I.L.R. 31 Calc. 503, 509; *Heath* v. *Deane*, L.R. [1905] 2 Ch. 86, at p. 93. "But the converse does not hold good in the case of a burthen, however long it may have been borne:" *per* Lord Macnaghten in *Simpson* v. *Attorney-General*, L.R. [1904] A.C. at p. 491; see also *Steel* v. *Houghton*, 1 H.Bl. at p. 60; 2 R.R. 715.

On p. 140,* to footnote (4) add the following:—

Gardner v. *Hodgson's Kingston Brewery Co.*, L.R. [1903] A.C. 229, at pp. 238, 239 (*per* Lord Lindley).

On p. 145,* in footnote (5), next after the reference to *Goodman* v. *Mayor of Saltash*, insert the following:—

Mercer v. *Denne*, L.R. [1904] 2 Ch. 534, at pp. 540, 554; [1905] 2 Ch. 538.

On p. 146,* to footnote (2) add the following:—

In *Secretary of State* v. *Haibatrao Hari*, I.L.R. 28 Bom. 276, 283, it was held that in India a fluctuating and unincorporated community was capable of owning property under a grant. See also *Navroji Manekji Wadia* v. *Dastur Kharsedji Mancherji*, I.L.R. 28 Bom. 20, at pp. 49, 50.

On p. 148,* next after the words "from entertaining," insert, as part of the same paragraph, the following:—

In *Bhola Nath Nundi* v. *Midnapore Zemindary Co.*(2) the plaintiffs and others whom they represented were occupiers

(1) *Ramessur Persad Narain Sing* v. *Koonj Behari Pattuk*, I.L.R. 4 Calc. 633 (P.C.); L.R. 4 App. Cas. 121; *Madhub Dass Bairagi* v. *Jogesh Chunder Sarkar*, I.L.R. 30 Calc. 281. See also *Rajrup Koer* v. *Abul Hossein*, I.L.R. 6 Calc. 394.

(2) I.L.R. 31 Calc. 503.

* The references to pages are to the pages in the 2nd Edition.

and cultivators of certain villages belonging to a permanently settled zamindari estate and held by the defendant company in *patni* right. They claimed and proved that they and their predecessors had from time immemorial enjoyed the right of pasturage over the waste lands of those villages. The Judicial Committee held that a legal origin must be presumed for the right claimed. It was held not to be a right in gross. The defendants were held to be entitled to cultivate the waste lands provided sufficient pasturage was left for the plaintiffs and those whom they represented.

On p. 148,* next after the word "prescription" at the end of a paragraph, and in continuation of the same paragraph insert the following:—

In *Kalu Khabir* v. *Jan Meah*(1) the plaintiffs, some of the landholders of two villages, suing under section 30, Civil Procedure Code, on behalf of themselves and the other holders of agricultural lands in those villages, claimed an easement to construct and maintain every year during the rainy season, within the limits of their villages, a dam across a natural streamlet flowing through those villages, for the purpose of irrigating their lands, but letting out the surplus water so that it flowed on, in its natural channel, to the lands of the defendants who were riparian owners lower down the streamlet, the Court held the plaintiffs to have established their title by prescription, as well as by custom, to the easement claimed.

and next after this fresh passage, on p. 148,* insert the following fresh paragraphs:—

Where a fluctuating body of persons (such as, *e.g.*, the inhabitants of a parish) have been in the enjoyment of a profit à prendre or of an easement from time immemorial, or for a very long period of time, beyond living memory—and where, therefore, justice demands that a lawful origin to the exercise of the right should be presumed if it is reasonably

(1) I.L.R. 29 Calc. 100, 107, 108, 109.

* The references to pages are to the pages in the 2nd Edition.

possible—the difficulty presented by the fact that they are incapable, under the English law, of acquiring a profit à prendre or an easement by grant to them (actual or presumed) has been surmounted by the English Courts by the presumption of a lost grant to some corporation, or some person or persons, subject to a trust in favour of such fluctuating body of persons.(1) Such a presumption would be rebutted if facts inconsistent with it were proved, as, *e.g.*, by the existence and production of a deed of grant the terms of which negatived the presumption of there having been such a trust.(2)

By Scottish law, at least forty years user must be proved, to establish a right such as that claimed in *Montgomerie & Co., Ld.* v. *Wallace-James*,(3) *viz.* a right by immemorial user for the burgesses and inhabitants of a burgh to use a piece of land in the burgh for purposes of recreation and of bleaching and drying clothes; and, though it is not a question of prescription, but of dedication inferred from user, the user must be of the same character as in the case of prescription,—nec vi nec clam nec precario. In that case the House of Lords, reversing the concurrent decisions of the Scottish Court of first instance and appellate Court on the question of fact, held that the user for 40 years necessary to establish the right claimed was not proved.

A faculty may be granted for a footpath across a parish church-yard for the use of the parishioners, together with a right of way along the path for the public, for pedestrian

(1) *Goodman* v. *Mayor of Saltash*, L.R. 7 A.C. 633; *Haigh* v. *West*, L.R. [1893] 2 Q.B. 19; *Attorney-General* v. *Lord Hotham*, 1 Turn. & Russ. 209; 24 R.R. 21. And see *Willingate* v. *Maitland*, L.R. 3 Eq. 103, at p. 109. Some of the cases are cases of claims to a property in the soil, the principle regarding this presumption being the same whether the claim is to a right of property in the *solum* or to a profit à prendre or an easement. In *Brown* v. *Dunstable Corporation*, L.R. [1899] 2 Ch. 378 (see at pp. 386, 387) the Court (Cozens-Hardy J.) found the evidence of user insufficient to raise the presumption of a lost grant to trustees for the inhabitants of a certain parish of an easement which the defendants contended had been so acquired.

(2) See observations of Lord Selborne L. C. and Lord Watson, in their speeches, in *Goodman* v. *Mayor of Saltash*, L.R. 7 A.C., at pp. 647 and 665.

(3) L.R. [1904] A. C. 73.

use, so long as the same shall be required for public convenience.(1)

On pages 148, 149,* delete the paragraph beginning with the words "A claim to a prescriptive right" and the footnotes belonging thereto, and substitute therefor the following fresh paragraphs :—

Easements not acquirable by prescription if unreasonable.

It has been held, under the English law, that a claim by prescription to a profit à prendre (whether appurtenant or in gross) which would destroy, or altogether exclude the servient owner from, the servient tenement, is bad in law and untenable, as being unreasonable.(2) And section 17, sub-section (*a*), of this Act, lays down that no right which would tend to the total destruction of the property the subject of the right can be acquired by prescription. In *Attorney-General* v. *Mathias*(3) a claim was set up to a right *in alieno solo* which (in the words of Mr. Justice Byles) was "a claim to subvert the soil and carry away the substratum of stone without stint or limit of any kind." The opinion of Byles J. on the law of the case was taken, and was concurred in by Sir W. Page Wood V. C., by whom the case was decided. The learned Judge of the Common Law Court, after having pointed out that it was an elementary rule of the law that a profit à prendre in another's soil could not be claimed by custom, as had been laid down in Gateward's case (6 Rep. 59), "which had been repeatedly followed and never overruled," proceeded (in his Opinion) thus:(4) "The next question is, can such a right as this be claimed even by prescription? . . . . The present is a claim, not only to carry away the soil of another, but to carry it away without stint or limit; it is a claim which

(1) *St. John the Baptist, Cardiff, (Vicar of)* v. *Parishioners of same*, L.R. [1898] P. 155; *St. George in the East, In re*, L.R. 1 P.D. 311.

(2) *Clayton* v. *Corby*, 5 Q.B. 415; 14 L.J., Q.B. 364; 64 R.R. 527; *Attorney-General* v. *Mathias*, 4 K. & J. 579; 27 L.J., Ch. 761.

(3) 4 K. & J. 579; 27 L.J., Ch. 761.

(4) 4 K. & J. at pp. 591, 592.

***The references to pages are to the pages in the 2nd Edition.**

tends to the destruction of the inheritance, and which excludes the owner. A prescription, to be good, must be both reasonable and certain (Com. Dig., 'Prescription'), and this alleged prescription seems to be neither. Thus, a claim of a common without stint annexed to a message without land is bad: *Benson* v. *Chester* (8 T. R. 396). Lord Coke says (Co. Litt. 122) that you must not exclude the owner of the soil. And in *Clayton* v. *Corby* (5 Q.B. 415), although a jury found a thirty years exercise without interruption, as of right, of a claim by prescription to dig clay in the plaintiff's land for the defendant's brick-kiln, and though the verdict could not be assailed, yet the Court of Queen's Bench gave judgment for the plaintiff, non obstante veredicto, on the ground that such a prescription was radically vicious, and incapable of being sustained, for that it was an indefinite claim to take all the clay, in other words to take the whole close. That case rests on the soundest rules of law, and is an authority expressly in point, shewing that the strongest evidence of user could not support this as a prescriptive claim. The only remaining question on this part of the case is this: Can the claim be sustained by evidence of a lost grant? Prescription presupposes a grant, and if you cannot presume a grant of an unreasonable claim before legal memory *a fortiori* can you not presume one since."

In *Carlyon* v. *Lovering*(1) this question did not present itself to the Court for its decision, for the finding of the Court with reference to the claim in that case, which was a claim to an easement to discharge sand, stones, &c., into a stream, was expressed in these words:(2) "We do not think that the effect of this claim is to destroy the plaintiff's land, although it may be detrimental thereto." In *Marquis of Salisbury* v. *Gladstone*(3) the claim, which was not a prescriptive claim but one based on custom, for copyholders to

(1) 1 H. & N. 784; 26 L.J., Exch. 251.
(2) 1 H. & N. at p. 799.
(3) 9 H.L. 692.

dig and take clay to an unlimited extent from the soil of the manor, to be sold outside the manor to any one, was upheld by the House of Lords as a valid claim and not void on the ground of unreasonableness, but in that case it was found that the clay formed only a portion of the soil of the manor, so that the exercise of the right claimed, even to an unlimited extent, would not be destructive of the whole of the soil.(1)

In *Heath* v. *Deane*(2) the defendant's claim of a right for the copyholders and freeholders of a manor to dig and take stone and sand in the waste lands of the manor, to be used and spent on their respective lands, was held, by Joyce J., to be proved against the lord of the manor and his transferee, the plaintiff. The claim appears to have been based on custom as to the copyholds and on prescription as to the freeholds,(3) and the judgment upholds the right as a customary right in respect of the copyholds and apparently also in respect of the freeholds, and also appears to uphold it as a prescriptive right in respect of the freeholds.(4) In that case it was held that the right claimed was not unreasonable, and also that its existence had been admitted by the lord of the manor, and it was not, therefore, necessary to decide whether reasonableness was a necessary condition to its validity.(5)

In *Rudhu Mandal* v. *Maliat Mandal*,(6) in which the plaintiffs' claim to a prescriptive easement of diverting water, in years of drought, and discharging it over the 1st defendant's land, so that it might pass on and irrigate fields of the plaintiffs lying beyond, was upheld, the defendants pleaded that the easement claimed was an unreasonable one, inasmuch as it precluded the 1st defendant from cultivating his land, as he had previously done, and destroyed his rights of enjoyment thereof. The Court overruled this plea, on the

(1) See 9 H. L. at pp. 703, 708.
(2) L.R. [1905] 2 Ch. 86.
(3) L.R. [1905] 2 Ch. at p. 87.
(4) L.R. [1905] 2 Ch. at p. 93.
(5) L.R. [1905] 2 Ch. at pp. 92, 93.
(6) I.L.R. 30 Calc. 1077.

ground that the easement claimed would not prevent the 1st defendant from using his land for growing paddy on in years when there was no drought or turning it into agricultural land as it became silted up, and that he could continue to use it, as he had theretofore done, when covered with water, as a fishery; but the Court (a Division Bench) went further and said that the prescriptive easement claimed, not being a customary easement, need not be reasonable(1). No authorities were referred to by the Court as supporting this proposition.

On p. 149,* next after the words "in derogation of a public right," insert a reference to a fresh footnote "(*a*)," and at the foot of that page insert the following fresh footnote:—

(*a*) See section 2, sub-section (*b*), as to the rights of the public there specified.

On p. 149,* at the word "Statute" insert a reference to a fresh footnote "(*b*)," and at the foot of that page insert the following fresh footnote:—

(*b*) But, in the converse case, where a private right of way exists first, a public right of way may be created over the soil over which the private right of way exists, by dedication of that soil to the use of the public as such public way by the owners thereof, and such creation of a public right of way does not, ipso facto, cause a merger or extinguishment of the private right of way, which can still exist concurrently with the public right of way over the same soil: *Reg.* v. *Inhabitants of Bradfield*, L.R. 9 Q.B. 552. See also *Rex* v. *Wright*, 3 B. & Ad. 681; 37 R.R. 520; *Allen* v. *Ormond*, 8 East 3; 9 R.R. 363; *Duncan* v. *Louch*, 14 L.J. (Q.B.) 185; 6 Q.B. 904.

On p. 149,* next after the word "Statute," insert, as part of the same paragraph, the following:—

In *Turner* v. *Ringwood Highway Board*(2) a public high way of a width of fifty feet had been set out by the Inclosure Commissioners under Act 41 Geo. III, c. 109, across

(1) I.L.R. 30 Calc. at p. 1082.
(2) L.R. 9 Eq. 418.

* The references to pages are to the pages in the 2nd Edition.

private land. About 25 feet only of this width had been used as the actual road, and the unused strips of land, on either side of the *via trita* and between it and the boundary lines of the highway as set out, had become overgrown with furze and heath and during the last 25 years before the suit, which was brought in 1869, trees had been growing thereon. The plaintiff sued for an injunction to restrain the Board from cutting down these trees, claiming to be entitled to them on the ground that he had purchased the soil over which the highway had been set out from the lord of the manor, to whom it had previously belonged, and that the right of the public over those portions of the 50-feet-wide ground set out by the Commissioners for a highway which had not been used as the *via trita* had been abandoned by non-user and extinguished. It was held that the rights of the public over those portions could not be held to have become extinguished, and that the defendants, the Highway Authority, were entitled to cut down the trees, as being a public nuisance as an obstruction upon the highway; though the plaintiff might be entitled to the trees when cut and removed, if he could make out a good title in himself to the ownership of the soil on which they were growing, which he had not made out to the satisfaction of the Court in this case. This, it will be observed, was not a case of an easement being set up as derogating from an existing public right, but of a claim to a right of property in the soil, a public right created over which was claimed to have become extinguished by non-user. In *The Municipal Board of Cawnpore* v. *Lallu*(1) the plaintiffs, who were Gangaputras, claimed that by long and continuous user by their ancestors and themselves they were entitled to a prescriptive right, to the exclusion of all other persons, including other Gangaputras than themselves, to sit whenever they pleased on a ghat on the bank of the Ganges for the purpose of performing certain religious ceremonies and re-

(1) I.L.R. 20 All. 200. See also *Husain Ali* v. *Matukman*, I.L.R. 6 All. 39.

ceiving dues, presents, &c. It was alleged by the defendants and not denied by the plaintiffs that the soil of the ghat was the property of the Government, and under the management and control of the defendants. The plaintiffs did not claim the right as being appurtenant to any immoveable property owned or occupied by them and as being, therefore, an easement, but claimed it as a right in gross. It was found by the Court that the ghat had been originally dedicated to the use of all members of the public desiring to resort there for the performance of their ablutions and religious ceremonies, and held that the exclusive right claimed to have been acquired by the plaintiffs in derogation of the public right could not be acquired.

On p. 149,* next after the words "provisions of the Act" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

In *Lord Advocate* v. *Wemyss*(1) Lord Watson expressed the opinion that, by the law of Scotland, the Crown, in which he had no doubt the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested, could not, without the sanction of the Legislature, make an effectual grant to a subject of any right or interest in that solum or any part of it which, if exercised by the grantee, might by possibility disturb the solum or in any way interfere with the uses of navigation, or with any right of the public, but that it could make such a grant of the minerals beneath the bed of the sea and the right of working them, in so far as they were capable of being worked without causing disturbance of the solum or any interference with navigation or other public rights.

On p. 150,* next after the word "user" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

So, a lost grant of a right to depasture cattle and horses on the herbage on a road, adjacent to the plaintiff's land,

(1) L. R. [1900] A. C. 48, at p. 66.

* The references to pages are to the pages in the 2nd Edition.

could not, it was held, be presumed from long-continued user (for over fifty years), the depasturing of animals other than sheep thereon being prohibited by a provision of a certain Inclosure Act.(1)

Section 17.

On p. 153,* next after the words "See note to section 15 (pages 148, 149)," insert the following:—

and notes to section 4 (page 18) on easements not acquirable by prescription.

On p. 156,* next after the words "not necessary to say," insert, as part of the same paragraph, the following:—

Such a right, in fact, was, in *Tebb* v. *Cave*,(2) held to exist by virtue of a covenant for quiet enjoyment contained in a lease of a newly built house which the defendant, the owner of the house and of an adjoining piece of vacant land, had granted to the plaintiff. Shortly afterwards the defendant erected on his adjoining piece of land a building of considerably greater height than that of the house leased to the plaintiff, the effect of which was that, when the wind was in certain directions, the current of air, which passed over the house, instead of passing on, as it had previously done, over the adjoining piece of land, was deflected and driven down the chimneys of the house, and the smoke, which would otherwise have issued from the chimneys, was driven down them into the rooms of the house. It was held that this was a breach of the covenant for quiet enjoyment, and that the plaintiff was entitled to a decree for damages (he had not asked for a mandatory injunction to pull down the obstructive building because there had been considerable delay in bringing the suit).

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(1) *Neaverson* v. *Peterborough Rural Council*, L.R. [1902] 1 Ch. 557.

(2) L.R. [1900] 1 Ch. 642.

* **The references to pages are to the pages in the 2nd Edition.**

On p. 160,* next after the word "wall" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

An easement to have branches of a tree overhanging the land of a neighbour cannot be acquired by prescription, either under the English law or the law of India.(1)

Section 18.

On p. 161,* next after the paragraph ending with the word "tenements," insert the following fresh paragraph :—

A regular usage of twenty years unexplained and uncontradicted is sufficient to warrant a Court, or a jury, in finding the existence of an immemorial custom, whereby a local public or class of persons, such as the inhabitants of a parish, are entitled to a quasi-easement over land, such as, *e.g.*, a right of way to and from a church or a market.(2) And from such modern usage, unless the contrary appear, the Court or jury ought to presume the immemorial existence of the right.(3)

On p. 165,* next after the word "uncertainty" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

In *Kalu Khabir* v. *Jan Meah*,(4) in which the plaintiffs, as landholders of two villages, obtained a declaration of their having the right to construct and maintain every year during the rainy season at a place within the limits of their villages a dam across a natural streamlet, flowing through those villages, for the purpose of irrigating their lands, and

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(1) *Lemmon* v. *Webb*, L.R. [1895] A.C. 1; [1894] 3 Ch. 1; *Hari Krishna Joshi* v. *Shankar Vithal*, I.L.R. 19 Bom. 420; and see *Behari Lal* v. *Ghisa Lal*, I.L.R. 24 All. 499, at p. 500.

(2) *Brocklebank* v. *Thompson*, L.R. [1903] 2 Ch. 344, 348, 350; *Rex* v. *Joliffe*, 2 B. & C. 54; 26 R.R. 264.

(3) *Brocklebank* v. *Thompson*, L.R. [1903] 2 Ch. 344, 350; *Jenkins* v. *Harvey*, 1 Cr. M. & R. 877—895; 40 R.R. 769; *Earl de la Warr* v. *Miles*, L.R. 17 Ch. D. 535.

(4) I.L.R. 29 Calc. 100.

*The references to pages are to the pages in the 2nd Edition.

a perpetual injunction restraining the defendants from interfering with such right,(1) and the defendants who were riparian owners lower down the channel were admitted to have a similar right of constructing a dam across the streamlet within their own village for irrigating their lands, and it was found on the evidence that the erection by the plaintiffs of their dam had not interfered with the riparian rights of the defendants nor prevented the water collecting at their (defendants') dam, the plaintiffs' dam being so constructed as to allow the surplus water to flow on to the defendants' lands, it was held that the injunction was not impugnable on the ground that it was too indefinite, the contention that it ought to have defined the limit of size of the dam, and the exact period within which the plaintiffs were entitled to maintain it, and to have contained a specific provision protecting the defendants' rights, being overruled.(2) In *Mohidin* v. *Shivlingappa*,(3) in which the defendants as representing a determinate class or division of the Mahomedan community of a village claimed a customary right to bury their dead all over a field belonging to the plaintiff, but only proved a custom to bury near a certain dargá which was situate in one corner of the field, it was held that the custom proved to bury near the dargá ought to be upheld as being sufficiently certain though the limits within which burials must be made were not defined but only shewn to be confined to burying near the dargá, and as being not unreasonable. The Court therefore decided that the plaintiff was only entitled to an injunction to restrain the defendants from burying otherwise than "near the dargá" or than "as near the dargá as possible." The report does not state what was the extent of the area of the plaintiff's field; nor did the judgment define by any limits of measurement or distance from the dargá what "near" the dargá was to be taken to extend to and include; the Court(4) said in their judgment: "The

(1) I.L.R. 29 Calc. 102, 103.
(2) I.L.R. 29 Calc. at pp. 107, 109, 110.
(3) I.L.R. 23 Bom. 666.
(4) Candy and Fulton, J.J.

criterion of 'reasonableness' by which the case of *Latchmiput Singh* v. *Sadaulla Nushyo*(1) was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shewn in *Hall* v. *Nottingham*,(2) a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. Here the defendants are entitled to claim for a limited class the right of burial in one corner of a field near a dargá. The mere possibility that after many years the number of tombs may have increased so much as to deprive the owner of the use of his field, or of a large portion of it, seems too remote to enable us to describe as unreasonable the custom in dispute."(3) The customary right here claimed was a right in gross, but the principle of the decision appears to apply equally to a customary easement, claimed by a limited class of persons, as owners or occupiers of houses or land in a village or locality.

Next after this (last above) fresh passage, insert, on p. 165,* the following fresh paragraph :—

In *Mercer* v. *Denne* (4) a custom for those inhabitants of the parish of Walmer who were fishermen, at all times seasonable for their business as fishermen, to spread their nets to dry on land owned by another person (the defendant), adjoining the foreshore of the sea, was held to be a valid custom by the law of England, being a custom which had existed from time immemorial, and not being uncertain nor unreasonable. It was not rendered uncertain nor unreasonable by a variation in the user, which had taken place, the numbers and the kinds of nets formerly in use,

(1) I.L.R. 9 Calc. 698.

(2) L.R. 1 Ex. D. 1.

(3) I.L.R. 23 Bom. at p. 672.

(4) L.R. [1904] 2 Ch, 534, 548—551 (decision of Farwell, J.); confirmed on appeal, L.R. [1905] 2 Ch. 538.

* The references to pages are to the pages in the 2nd Edition.

and the periods for which they were formerly spread to dry, having been altered and increased in consequence of the increased requirements of the business and of the introduction of a new and improved method of treating the nets preparatory to use for fishing (oiling having been substituted for tanning them), provided the fishermen used the land in due accordance with, and not in excess of, the requirements of their business. Those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, provided the burden they thereby throw on the landowner, though an increased burden, is not an unreasonable burden.(1) Nor was this custom defeated, Farwell J. held, in respect of its presumed immemorial user, by the fact, as found by him, that there was no user of a portion of the land in question during a period of years(2) during which, owing to an encroachment of the sea, that portion was below high-water mark; the sea having subsequently to that period receded and left that portion again above high-water mark; the non-user during that period being no interruption of the right, but only of the possession.(3) Nor did the variation, so caused, in the extent of the land over which the user had taken place, Farwell J. held, render this custom bad for uncertainty(4). And it was held by Farwell J. as well as by the Court of Appeal, in respect to the accretion (to the extent of 3 acres) to the land subject to this custom which was found to have taken place by slow and imperceptible degrees, from the gradual recession of the sea, that the land so added became subject to the same custom as the land to which it was an accretion,

(1) L.R. [1905] 2 Ch. at pp. 581, 586; [1904] 2 Ch. at pp. 552, 553. See also *Dyce* v. *Hay*, 1 Macq. 305, 312; *City of London* v. *Vanacre*, 12 Mod. 270, 271 (*per* Holt, C. J.); *Fitch* v. *Rawling*, 2 H. Bl. 393; 3 R.R. 425.

(2) From 1795 to 1844: L.R. [1904] 2 Ch. at p. 555. Cozens-Hardy L.J. differed from Farwell J. on this question of fact: see L.R. [1905] 2 Ch. at p. 583.

(3) L.R. [1904] 2 Ch. at pp. 555, 556.

(4) L.R. [1904] 2 Ch. at pp. 556, 557.

and the custom was not rendered uncertain or unreasonable and therefore invalid by such accretion and its appropriation to the same user as the land to which it had been added.(1) The customary right in question in *Mercer* v. *Denne* was not an easement but a right in gross, but the principle of a portion of the decision therein on objections which were raised to the custom on the ground of alleged unreasonableness and uncertainty appear to apply to customary easements.

On p. 168,* to footnote (4) add the following:—

Constable v. *Nicholson*, 14 C.B. (N. S.) 230; 32 L.J., C.P. 240; *Chilton* v. *Corporation of London*, L.R. 7 Ch. D. 735; *Austin* v. *Amhurst*, L.R. 7 Ch. D. 689, 691.

On p. 169,* in continuation of the paragraph ending with the word "*solo*" insert the following:—

And, in the same case, Lord Blackburn said: "*Gateward's Case* is reported in 6 Co. Rep. 60 and also in Cro. Jac. 152. The two reports quite agree, and, as I think, from them both it is to be collected that the reason, or at least a principle reason, why the custom was held bad was that it is repugnant to the nature of an inheritance in a profit à prendre in real property that it should be vested in a body not capable of releasing or dealing with it; or at least, that it is against the policy of the law of England to allow it to be so vested."(2)

On p. 169,* next after the paragraph ending with the word "maintainable," insert the following fresh paragraph:—

But, in manors, there may be valid customary rights of the copyholders and freeholders to take from waste lands, the soil of which is vested in the lord of the manor, stone, gravel, clay, turf, timber, or other substances, for the

(1) L.R. [1904] 2 Ch. at pp. 557—560; [1905] 2 Ch. at pp. 578, 582, 584.

(2) L.R. 7 App. Cas. at p. 655. See also *Lord Rivers* v. *Adams*, L.R. 3 Ex. D. at p. 364.

*** The references to pages are to the pages in the 2nd Edition.**

beneficial use of their copyhold and freehold tenements, respectively held of the manor.(1)

On p. 169,* in continuation of the paragraph ending with the word "them," insert the following:—

So, such a right, *e.g.*, as that to which the defendant in *Truro Corporation* v. *Rowe*(2) set up a claim—(*a*) by virtue of a local custom, (*b*) as incidental to the right by common law (or general custom) of the public of fishing in the sea—*viz.* a right in gross to the exclusive use of a certain portion of the foreshore of a tidal estuary for the purpose of depositing thereon oysters obtained by dredging in the sea, is not within the purview of this section nor any other section of this Act.(3)

On p. 169,* next after this (last above) fresh passage, insert the following fresh paragraph:—

In *The Municipal Board of Cawnpore* v. *Lallu*(4) Blair J. expressed it as his opinion that by the English law no private right in gross *in alieno solo* could be acquired by custom, though customary rights in gross *in alieno solo* were acquirable by such classes of persons as the inhabitants of a manor or a township, but that in such cases the rights were *publici juris*, and that such a right as that claimed by the two plaintiffs, who were Gangaputras, *viz.* a right for themselves, as previously for their ancestors, to use a bathing ghat, the soil of which belonged to the Government, for certain purposes, to the exclusion of all other persons, including all other Gangaputras, could not be acquired by custom.

The right in gross adjudged to belong to the plaintiffs in *Ramrao* v. *Rustom Khan*,(5) to perform certain religious

(1) *Heath* v. *Deane*, L.R. [1905] 2 Ch. 86; *Duke of Portland* v. *Hill*, L.R. 2 Eq. 765.

(2) L.R. [1902] 2 K.B. 709; [1901] 2 K.B. 870.

(3) See section 2, sub-section (*b*).

(4) I.L.R. 20 All. 200, at pp. 203, 204.

(5) I.L.R. 26 Bom. 198.

* The references to pages are to the pages in the 2nd Edition.

services and ceremonies in the graveyard in which their relatives had been interred, though the ownership of the land might be vested in others, was a right based not on a local custom, but on a general religious usage of the Mahomedan community obtaining throughout the country.

Section 20.

On p. 174,* next after the words "consent decrees" insert a reference to a fresh footnote "(*a*)," and at the foot of that page insert the following fresh footnote :—

(*a*) See *Bolye Chunder Sen* v. *Lalmoni Dasi*, I.L.R. 14 Calc. 797, 801; *Kadambini Debi* v. *Kali Kumar Haldar*, I.L.R. 26 Calc. 516.

Section 23.

On p. 179,* next after the words "otherwise, not," insert, as part of the same paragraph, the following :—

These observations, as to the effect of moving forward or backward the plane of windows, apply, mutatis mutandis, to a raising or lowering of a skylight (assuming it to be an "ancient light"),(1) and, no doubt, to an alteration in position of any other aperture for the reception of light (the same assumption being made), whether its plane be vertical, horizontal, or otherwise.

On p. 179,* next after the paragraph ending with the words "note to section 43," insert the following fresh paragraph :—

In *Bai Hariganga* v. *Tricamlal*(2) the plaintiff had an easement of access to two windows in the back wall of his house of light and air passing over adjoining land belonging to the defendant upon which the defendant had a shed the roof of which was lower than those windows. The plaintiff rebuilt his house and opened two windows in the back wall of it on the second floor. These new windows

(1) *Smith* v. *Baxter*, L.R. [1900] 2 Ch. 138.

(2) I.L.R. 26 Bom. 374.

*** The references to pages are to the pages in the 2nd Edition.**

were in a higher position than that of the said two old windows, and did not receive the same, or a substantial part of the same, cones of light as were received by the old windows. Thirteen years afterwards the defendant pulled down his shed and built on his land a house which obstructed the access of light and air to the plaintiff's two new windows; whereupon the plaintiff sued for an injunction. It was held that the easement in respect of the old windows did not enure to the plaintiff in respect of the new windows. The burden imposed by an easement of light and air to the new windows might be less than the burden imposed by the old easement, the new windows being on a higher level than the old ones, but it was a different burden. This was not a mere change of place of enjoyment of the same easement, like the case where a window is set back or set forward by the dominant owner, in rebuilding his house, but still receives the same cone of light,(1) but was a case of a claim being set up to what was a new and different easement from the easement which had existed in respect of the old windows; and, the plaintiff having enjoyed the access of light and air to the new windows for only 13 years, the suit failed.

On p. 181,* next after the paragraph ending with the word "lost", insert the following fresh paragraph :—

In *Jesang* v. *Whittle*(2) the defendant, as the owner of a field, had an easement of way over the plaintiff's adjoining field, the way being used by him for the purpose of carrying agricultural produce from his field on to a public road. The defendant erected a ginning factory or cotton press on his field, and began to use the way for the purpose of conveying goods to and from his factory. He was held to be entitled to make this new use of the way, provided he did not thereby increase the burden to which the previous

(1) See note to section 38, *infra*, p. 260, and cases there cited.

(2) I.L.R. 23 Bom. 595.

* **The references to pages are to the pages in the 2nd Edition.**

user subjected the servient tenement. In *Desai Bhaoorai* v. *Desai Chunilal*(1) the defendants, as owners of an agricultural field, had acquired, apparently by prescription, a right of way from and to their field across the plaintiff's field, the user of the way by the defendants being for agricultural purposes. The defendants converted their field into a timber depôt, and began to use the way for taking over it carts loaded with timber. In the lower appellate Court's judgment it was stated that timber carts did not take up more space than that required for carts laden with agricultural produce. The High Court held that the defendants' easement did not entitle them, by converting their field from agricultural land into a timber depôt, to alter the user of the way from a user for agricultural purposes to a user for the purposes of a timber depôt, whether the easement had been acquired by prescription or had originated on the severance of the two tenements, which were stated to have been at one time joint family property and to have become the separate properties of the plaintiff and the defendants respectively on a partition; that this alteration of the user would substantially increase the burden; and that the defendants must be restrained by injunction from using the way otherwise than for agricultural purposes. It does not appear from the report that either of the lower Courts found, on the evidence, that such substantial increase of burden *de facto* resulted, or must result, from the change of user. The argument before the High Court (on Second Appeal) was on the law of the case solely(2); and from the whole judgment it would appear that the observation in the judgment that the new use of the way was "obviously a most substantial increase of the burden, and the lower Court was in error in deciding otherwise,"(3) was a ruling of law and meant that the alteration in the purposes for which user of the way was made, which attended the alteration of the dominant

(1) I.L.R. 24 Bom. 188.

(2) See I.L.R. 24 Bom. at p. 191.

(3) I.L.R. 24 Bom. at p. 192.

tenement, must necessarily, as a legal consequence, increase the burden on the servient tenement. The judgment contains no remark on, or mention of, *Jesang* v. *Whittle*, (1) which was relied on, in the argument, by the respondents (defendants).

In cases such as the two last above referred to, the sections of the Act to be principally considered (assuming the Easements Act to be in force where the tenements are situate) are section 23, section 29 (its first paragraph), and section 28. It is clear that in neither of those two cases had the dominant owner varied the line of way (s. 23, *Exception*); nor had he infringed the rule laid down in s. 28, sub-s. (*a*), under which a right of way as a footpath only, or as a footpath and bridle-path only, could not be used for carts or carriages, or any other way of a particular kind as a way of another kind. The questions presented for decision in both those cases resolve themselves into the question of the correct interpretation and application of the rules in s. 23 and the first paragraph of s. 29, and, to a certain extent, s. 28, and, in the latter case, s. 13.

In the case of a right in gross, *viz.* a customary right of fishermen dwellers in a certain parish to spread their nets to dry, at all seasonable and proper times, on certain land belonging to another person, an increase in the user of the land, and consequently in the burden thrown on the owner of it, had resulted from an increase in the number of nets used by the fishermen, and in the periods for which they were spread to dry owing to an alteration in the mode of preparing the nets for use in fishing (oiling having been substituted for tanning). They were held to be entitled by virtue of the custom to make this increased use of the land, notwithstanding the increase in the burden thereby thrown on the landowner(2).

(1) I.L.R. 23 Bom. 595.

(2) *Mercer* v. *Denne*, L.R. [1905] 2. Ch. 538; [1904] 2. Ch. 534; and see note on this case under section 18, in Supplement. See also *Dyce* v. *Hay*, 1 Macq. 305, 312; *City of London* v. *Vanacre* (per Holt, C.J.), 12 Mod. 270, 271.

Section 24.

On p. 182,* next after the paragraph ending with the word "engine," insert the following fresh paragraph :—

In *River Ribble Joint Committee* v. *Halliwell—The same* v. *Shorrock*,(1) the defendants, as the owners of weaving mills on the bank of a river, had a prescriptive right to divert water from the river and impound it in a reservoir. The water so diverted was polluted by the discharge into it from manufactories higher up the river of vegetable and other substances. As those substances sank to the bottom of the reservoir, and the upper part of the water therein became sufficiently clear, it was used by the defendants for the purpose of condensing, their mills being worked by steam-power. The deposit so formed on the bottom of the reservoir became putrid. In order to cleanse the reservoir and prevent it from becoming silted up, and prevent the water from becoming unfit for condensing purposes, the defendants used once a week, by opening certain sluice-gates, to allow water to flow through and out of the reservoir into the river, carrying with it the putrid deposit. It was held that their right to divert and impound the water of the river for the purposes of their mills carried with it, as a necessary incident thereto, the right so to discharge this putrid matter into the river.

On p. 183,* next after the paragraph ending with the word "house," insert the following fresh paragraph :—

"It may be taken," said Vaughan Williams L.J. in his judgment in *R. H. Buckley & Sons, Ld.* v. *N. Buckley & Sons*,(2) "that the decision in that case" (*Pomfret* v. *Ricroft*,(3) just previously cited by his Lordship) "establishes that the owner of the servient tenement is under no obligation to the owner of the dominant tenement to execute such repairs as may be necessary for the enjoyment of the easement, and that the owner of the dominant tenement

(1) L.R. [1899] 2 Q.B. 385, 389, 390; [1899] 1 Q.B. 27, 36.
(2) L.R. [1898] 2 Q.B. 608, 614.
(3) 1 Wms. Saunders, 321.

* The references to pages are to the pages in the 2nd Edition.

cannot sue the owner of the servient tenement for not doing such repairs."(1) But where a landowner brings water on to his land by means of an artificial watercourse for the purpose of his beneficial use of his land, and is consequently under the obligation to keep the banks of the watercourse, and any sluice-gate by which the flow of the water into or out of the watercourse is controlled, in repair, so as to prevent the water escaping into and damaging his neighbour's land,(2) he is not relieved from that obligation if, and by reason that, the latter acquires an easement to take water from the watercourse and to have a free flow of water therein maintained, with the incidental or accessory right to repair the watercourse and the sluice-gate; and if, through the failure of the former to keep the watercourse or sluice-gate in repair, the water escapes into and damages the land of the latter, in an action for damages by him against the former the fact that the plaintiff had the right to execute the repairs and that the defendant, *quâ* servient owner, was not bound to execute them, is not a good defence to the action.(3)

On p. 183,* to footnote (1) add the following :—

Imperatrix v. *Vanmali*, I.L.R. 22 Bom. 525.

On p. 184,* to footnote (6) add the following :—

And see *Behari Lal* v. *Ghisa Lal*, I.L.R. 24 All. 499, at p. 500. See note to section 15, at pp. 131, 132 (*supra*).

Section 27.

On p. 187,* next after the paragraph ending with word "on," insert the following fresh paragraph :—

In the case of an easement of support, the servient owner is entitled to alter the means of support—thus, he can substitute artificial for the original natural supports—and still be within his rights.(4) So, in the case of an easement of

(1) See also section 27 of this Act.

(2) See *Rylands* v. *Fletcher*, L.R. 3 H.L. 330; L.R. 1 Ex. 265.

(3) *R. H. Buckley & Sons, Ld.* v. *N. Buckley & Sons*, L.R. [1898] 2 Q.B. 608. And see note on that case under section 7, in Supplement.

(4) See note in commentary on section 34 (p. 217,* *infra*).

***The references to pages are to the pages in the 2nd Edition.**

supply of water for the irrigation of lands of the dominant owner from a source situated in the servient owner's land, a mere alteration by the servient owner of the source of supply of the water, not affecting such supply, would appear to be no infringement of the easement: see *Chidambara Row* v. *Secretary of State*,(1) where, however, this was not the precise point decided, but that such alteration would not entitle the dominant owner to claim a supply of water for the irrigation of an additional extent of his land.

Section 28.

On p. 189,* next after the paragraph ending with the word "manner," insert the following fresh paragraph :—

Right of way.

Where, in England, a railway is made intersecting the land of a landowner, he consequently becoming entitled to a right of way over or under the railway and the railway company bound, under the Railways Clauses Consolidation Act, 1845, s. 68, to construct accommodation works accordingly, the extent of that right of way is commensurate with the landowner's requirements, having regard to the character and the use of the land at the time when it was so severed, including any alteration or extension of that use of the land in its then character which could or ought to have been within the contemplation of the parties at that time; he is not entitled, if the character and use of the land is thereafter entirely altered, or otherwise, to claim a more extensive and burdensome user of the easement beyond its extent as thus defined.(2)

On p. 192,* next after the paragraph ending with the word "collieries," insert the following fresh paragraph :—

Easements acquired by implied grant.

Where, on a severance of ownership of two properties, the owner of one of them becomes entitled to an easement

(1) I.L.R. 26 Mad. 66, at p. 68.

(2) *Great Western Ry. Co.* v. *Talbot*, L.R. [1902] 2 Ch. 759; *Great Northern Ry. Co.* v. *M'Alister*, 1 I.R. 587, 602, 605; *Rhondda & Swansea Ry. Co.* v. *Talbot*, L.R. [1897] 2 Ch. at p. 137; *Reg.* v. *Brown*, L.R. 2 Q.B. 630.

*** The references to pages are to the pages in the 2nd Edition.**

over the other property, under section 13, sub-sections (*b*), (*d*), or (*f*), of the Indian Easements Act, or under section 6 of the Conveyancing and Law of Property Act, 1881, the extent and mode of enjoyment of the easement to which he is entitled is co-extensive with what the enjoyment was at the time of the transfer, partition, or conveyance.(1)

On p. 192,* next after the paragraph ending with the word "passengers," insert the following fresh paragraph :—

Abuse of right of way.

An easement of way does not entitle the dominant owner to use the road, path, or other strip or piece of land, over which his right of way extends for any purposes other than those of, or properly incidental to, passage; similarly as, in the case of a public road or highway, which crosses private land, a member of the public is not entitled to use the highway for purposes foreign to those of passage: see *Hickman* v. *Maisey*,(2) in which the defendant, who was part-owner of a certain publication, was in the habit of walking backwards and forwards on a portion of that section of a highway which, traversed the plaintiff's land, watching and taking notes of for his publication, the trials of race-horses on adjacent land, of which also the plaintiff was the owner, and this use of land belonging to the plaintiff dedicated to the public for use as a highway was held to be a trespass on that land.

On p. 193,* next after the word "door" at the end of a paragraph, insert, in continuation of the same paragraph, the following :—

"Window."

A glazed sloping roof of a conservatory has been held to be within the meaning of the word "window."(3)

On pp. 194, 195,* delete from the words "According to a less recent English decision" down to the words "during that

(1) *International Tea Stores Co.* v. *Hobbs*, L.R. [1903] 2 Ch. 165, 173.

(2) L.R. [1900] 1 Q.B. 752. See also *Harrison* v. *Duke of Rutland*, L.R. [1893] 1 Q.B. 142.

(3) *Easton* v. *Isted*, L.R. [1903] 1 Ch. 405; [1902] W.N. 68. The sloping roof was also held to be a window "overlooking" the defendant's land within the meaning of that word in a certain written agreement between the parties, inasmuch as it received light passing over that land.

*** The references to pages are to the pages in the 2nd Edition.**

period by the dominant owner," and substitute therefor the following fresh paragraphs :—

Prescriptive right to light :—s. 28, para. (c).

Of the numerous decisions upon the question of the extent of the right, in the case of rights to light acquired by prescription ("ancient lights"), the principal ones are reviewed and examined by Wright J. in *Warren* v. *Brown*(1), and by the House of Lords in the judgments in *Colls* v. *Home & Colonial Stores, Ld.* (2) The doctrine affirmed by the earlier decisions limited the right to a right to so much light as is according to the ordinary notions of mankind required for the comfortable use and enjoyment of the dominant building, if it is a dwelling-house, or for its beneficial use and occupation, if it is a shop, warehouse, or other place of business, so that an obstruction to the light, to be actionable, must amount to a nuisance. Some of those earlier decisions were anterior to the passing of the Prescription Act, 1832, and were therefore decisions on the non-statutory law of prescriptive rights to light, and some of them were subsequent to its coming into operation and held that, so far as the nature and extent of the right and what constituted an infringement of it were concerned, no alteration of the law had been effected by that Act. Then came the cases, some of the judgments in which, or observations made in those judgments, were, or were regarded as, authorities for the view that the right acquirable under that Act was a right to the whole quantity of light which had been enjoyed—*i.e.* the access of which to the window or windows in question had existed(3)—during the whole of the prescriptive period, and that any obstruction causing a substantial diminution of that light and consequent appreciable damage to the dominant owner was actionable, although the obstruction was not such as to reduce that light to less than what would be ordinarily required for the comfortable

(1) L.R. [1900] 2 Q.B. 722.

(2) L.R. [1904] A.C. 179.

(3) See note to section 15 on pp. 123, 124.*

***The references to pages are to the pages in the 2nd Edition.**

enjoyment of the dominant tenement as a dwelling house or its beneficial use for business purposes. In *Warren* v. *Brown*(1) Wright J., who tried the action, decided the case in accordance with the view of the law enunciated in the earlier decisions, but his decision was reversed by the Court of Appeal, who upheld the other view.(2) In *Colls* v. *Home & Colonial Stores, Ld.*(3) Joyce J., sitting as a judge of first instance, followed the decision of Wright J. in *Warren* v. *Brown*, which had not at that time been adjudicated on by the Court of Appeal. Joyce J.'s decision having been reversed by the Court of Appeal, the case was carried to the House of Lords, who unanimously reversed the judgment of the Court of Appeal and restored that of Joyce J., and overruled the decision of the Court of Appeal in *Warren* v. *Brown*. The House of Lords held, and it must now be considered to be authoritatively settled, as the law of England, that the doctrine of the earlier decisions as to the nature and extent of the right in the case of ancient lights is the correct doctrine, *viz.* that the extent of the right is limited to that amount of light which is sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the dominant tenement if it is a dwelling-house, or for the beneficial use and occupation of it if it is a warehouse, shop, or other place of business, and that an obstruction to the access of the light to a window, enjoyed by the dominant owner, is not actionable unless it amounts to a nuisance, as rendering the dominant tenement materially less fit for such comfortable use and enjoyment or such beneficial use and occupation; and that this was the law as it stood before the Prescription Act, 1832, came into force, and has continued to be the law in cases governed by that Act, which made no alteration in the pre-existing law as to the nature and extent of the right, but only in the conditions or length of user by which the right is acquirable.

(1) L.R. [1900] 2 Q.B. 722.
(2) L.R. [1902] 1 K.B. 15.
(3) L.R. [1904] A.C. 179; [1902] 1 Ch. 302.

The measure of the extent of a prescriptive right to light which had been held to be the true one in the decisions which were overruled by the House of Lords in *Colls* v. *Home & Colonial Stores, Ld.* had, no doubt, the advantage of certainty, and of freedom from the difficulty which, in many cases, besets the application to the facts of the case of the standard now upheld by the House of Lords as the true one. With reference to this Lord Lindley, in his judgment in *Colls* v. *Home & Colonial Stores, Ld.*, said:(1) "The expressions 'the ordinary notions of mankind,' 'comfortable use and enjoyment,' and 'beneficial use and occupation' introduce elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement. If a more absolute standard had been adopted in all cases, certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive on the owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which, in fact, diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for." And again:(2) "There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is

(1) L. R. [1904] A.C. at pp. 208, 209.

(2) L. R. [1904] A.C. at p. 213.

the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in these controversies." And Lord Halsbury L.C. in his judgment, in the same case, referring to the standard laid down in the case to be the true standard, observed:(1) "What may be called the uncertainty of the test may also be described as its elasticity."

It was not necessary in *Colls* v. *Home & Colonial Stores, Ld.* to decide whether a right to an extraordinary amount of light, that is an amount greater than what is sufficient according to the ordinary notions of mankind for the comfortable enjoyment of the dominant tenement as a dwelling house or for its use for ordinary business purposes, can be acquired by twenty years uninterrupted use and enjoyment of the light for an extraordinary purpose, because in that case it was not proved that the light had been used, for the extraordinary purpose for which it was claimed, for twenty years.(2) But that such a right cannot be acquired by a user for a period of twenty years, during a portion only of which the purpose for which it was used was an extraordinary purpose, was decided in that case, as also it had been by Malins V.C. in *Lanfranchi* v. *Mackenzie.*(3) The contrary was held by Kekewich J. in *Lazarus* v. *Artistic Photographic Co.*(4), but his decision in that case, as also his decision in *Attorney-General* v. *Queen Anne & Gardens Mansions,*(5) appear to have been based on the view as to the extent of the statutory prescriptive right to light which has now been condemned by the House of Lords in *Colls* v.

(1) L.R. [1904] A.C. at p. 185.

(2) See L.R. [1904] A.C. at pp. 203, 204.

(3) L.R. 4 Eq. 421.

(4) L.R. [1897] 2 Ch. 214. The extraordinary purpose, in this case, was taking photographic portraits.

(5) 5 Times L.R. 430.

Home & Colonial Stores, Ld., and must therefore, it is submitted, be considered as overruled by that House of Lords decision. Upon the former question, *viz.* whether a right to an extraordinary amount of light is acquirable by user of light for an extraordinary purpose for the full period of twenty years, Malins V.C. in *Lanfranchi* v. *Mackenzie* expressed the opinion, but it was only *obiter*, that question not being one that had to be decided in that case, that such a right could be so acquired, provided the servient owner had knowledge that the light was being used for such extraordinary purpose.(1) Lord Davey, in his judgment in *Colls* v. *Home & Colonial Stores, Ld.*, after remarking that the plaintiffs had not proved, nor attempted to prove, such a user for twenty years, said:(2) "It is unnecessary to say, therefore, whether such a claim would be good in law. Malins V.C. thought it could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way, and reserve my opinion." And Lord Lindley, in his judgment in the same case, said:(3) "The decision in *Kelk* v. *Pearson*(4) has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. If there is no right of action, a fortiori there is no right to an injunction to prevent a permanent diminution of light unless it amounts to a nuisance. But, in considering what is an actionable nuisance, regard is had, not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people, and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for a diminu-

(1) L.R. 4 Eq. at pp, 430, 431.
(2) L.R. [1904] A.C. at p. 204.
(3) L.R. [1904] A.C. at p. 209.
(4) L.R. 6 Ch. App. 809.

tion of light if only his special requirements are interfered with. Some important decisions will be found as to nuisances to persons carrying on delicate trades, or requiring more comfort or freedom from annoyance than ordinary people, in the cases of *Walter* v. *Selfe*,(1) *Crump* v. *Lambert*,(2) and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*(3); and as to the character of the neighbourhood, see *St. Helen's Smelting Co.* v. *Tipping*.(4)" It is difficult to see how a prescriptive right to an extraordinary amount of light could, under any circumstances, be acquired, consistently with the principles on which the decision in *Colls* v. *Home & Colonial Stores, Ld.*, and the previous decisions which it approved, are founded though that point was not decided in any of those cases.

Precisely that point, however, subsequently arose for decision in *Ambler* v. *Gordon*(5), in which Bray J., before whom the case came, held that by user of light (for the prescriptive period) for the purpose of a special business, that is a business requiring a special or extraordinary amount of light, a right is not acquired to any larger amount of light than what would have been acquired if the user of the light had been for the purpose of an ordinary business, that is one requiring only an ordinary amount of light; and that this is so even if the user of the light for the special business, requiring an extraordinary amount of light, has taken place to the knowledge of the servient owner. The learned Judge said:(6) "I think in many of the judgments in *Colls' Case*(7) and in other cases it is implied, if not expressed, that, in measuring the quantum of light to which the owner of the dominant tenement is entitled, the purpose for which he desires to use, or uses,

(1) 4 De G. & Sm. 322.
(2) L.R. 3 Eq. 409.
(3) L.R. [1902] A.C. 381, at p. 393.
(4) 11 H.L.C. 642; 35 L.J., Q.B. 66.
(5) L.R. [1905] 1 K.B. 417.
(6) L.R. [1905] 1 K.B. at p. 424. For the whole of the reasoning on which the decision was grounded see pp. 423, 424, 425.
(7) L.R. [1904] A.C. 179.

the light should be disregarded, and does not either enlarge or diminish the easement which he has acquired. See especially the judgment of Lord Davey, where he says(1): 'It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. . . . If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard.'"

It may be mentioned that, in that case, Bray J. held that, where a building, or a room, is used for business purposes, the question whether, with reference to the terms of the rule laid down by the House of Lords in *Colls* v. *Home & Colonial Stores, Ld.*, the business for which it is used is an "ordinary" business, requiring only an ordinary amount of light, or is a special business requiring an extraordinary amount, is a question of fact, not one of law nor even a mixed question of fact and law.(2)

The extent of the prescriptive right to light acquired under the Indian Easements Act, as defined by section 28, sub-section (*c*), thereof, appears to be that which was held by the Court of Appeal in *Warren* v. *Brown*(3) and in *Home & Colonial Stores, Ld.* v. *Colls*(4), and in those English cases previous to these in which the same view was affirmed, to be its extent under the English Prescription Act, 1832,—a much more extensive right than that which has now been held by the House of Lords(5) to be the right acquirable under the English Act as well as that acquirable under the non-statutory English law of prescription. But the remedies given by sections 33 and 35 of the Indian Easements

(1) L.R. [1904] A.C. at p. 203.
(2) L.R. [1905] 1 K.B. at p. 422.
(3) L.R. [1900] 2 Q.B. 722, (overruled by the House of Lords).
(4) L.R. [1902] 1 Ch. 302, (reversed by the House of Lords).
(5) in *Colls* v. *Home & Colonial Stores, Ld.*, L.R. [1904] A.C. 179.

Act do not, at least in the case of an occupier of a dominant tenement, as distinguished from the owner thereof, as such, appear to be co-extensive with the right as defined in section 28 of that Act. For by section 33 a suit for damages for disturbance of an easement is maintainable only when the disturbance has caused substantial damage, and by *Explanation II* of that section, in the case of a right to light, no damage is substantial within the meaning of the section unless it falls within *Explanation I* thereto, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit; in accordance with which it was laid down in *Chotalal Mohanlal* v. *Lallubhai Surchand*(1) that the test, as to whether there is a right of action either for an injunction or for damages for interference with ancient lights, is whether by reason of the obstruction an insufficient amount of light for the comfortable inhabitation of the dominant house has access to the windows affected. Under *Explanation I*, however, which makes the doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, substantial damage within the meaning of the section, it may be that the owner, or a mortgagee of the dominant tenement, or a person having any other interest therein, not being in the occupation of the tenement, or, if in the occupation of it, not as such occupier but as such owner, mortgagee, or person having some other interest therein, has a right of action for an obstruction to that amount of light to which his extensive substantive right as defined by section 28, sub-section (*c*) (assuming his right to be a prescriptive one) entitles him, notwithstanding that the obstruction is not such as to interfere materially with the physical comfort of the occupier (if any) of the tenement, as such occupier, or to prevent him from carrying on his accustomed business therein as beneficially as he did before

(1) I.L.R. 29 Bom. 157.

the obstruction was made. But, be this as it may, the remedy under section 33, in the case of the occupier, as such, appears to be limited to that which falls within *Explanation II* only, and not to be commensurate with the right as defined in section 28, sub-section (*c*).

And these observations apply also to that portion of section 35 which gives a remedy by way of injunction in the case of disturbances of prescriptive rights to light where the obstruction to the light has already been effected and is not merely threatened, because that section provides that where the act of disturbance has been committed, an injunction may be granted when damages for such disturbance might be recovered under section 33. But where the disturbance is not a thing already done, but is only threatened, an injunction is, by section 35, made grantable when the thing threatened to be done would, if carried out, necessarily "disturb the easement," without any provision that the threatened disturbance must be such as would (if carried out) cause substantial damage as defined in section 33, *Explanations I* and *II*, to the plaintiff, and therefore it would seem that, in the case of a threatened disturbance of a prescriptive right to light, the remedy by way of prohibitory injunction grantable (subject to the provisions of the Specific Relief Act, sections 52—57) under the Indian Easements Act is commensurate with the right as defined in section 28, sub-section (*c*).

By the law of British India as it stood before the Indian Easements Act came into force, and as in those parts of British India to which that Act has not been extended it has continued to be since that Act came into force, the extent of a prescriptive easement of light appears to be that which it was held to be in the earlier English decisions above referred to and which it has now by the House of Lords, in *Colls* v. *Home & Colonial Stores, Ld.*,(1) been pronounced to be; and the right of action for its disturbance is co-extensive with the easement. See *Bagram* v. *Khettranath*

(1) L.R. [1904] A.C. 179.

Karformah(1); *Delhi & London Bank, Ld.* v. *Hem Lall Dutt*(2); *Bottlewalla* v. *Bottlewalla.*(3)

On p. 196,* delete the passage from the words "In accordance with the latest" to the words "ordinary purposes" (at end of paragraph), and footnote (1).

Section 29.

On p. 199,* next after the words and figures "see note to section 28 (pp. 195, 196)," insert the following fresh paragraph:—

The question whether by an addition to or extension of the dominant tenement made by the dominant owner a substantial new injury to the servient owner has been caused,—as a distinct question from that (which is also one of fact) whether the dominant tenement and the addition thereto, taken together as a whole, have (by the dominant owner's use of them) substantially increased the nuisance which the servient owner suffered from the easement before the addition was made to the dominant tenement,—is a question of fact.(4)

In the case of a customary right, founded on immemorial user, of the fishermen inhabitants of a parish at all seasonable and proper times to spread their fishing nets to dry on a piece of land belonging to another person and abutting on the foreshore of the sea, which was not an easement but a right in gross, an accretion to that land, which had gradually and imperceptibly been formed by alluvion and recession of the sea, was held to be subject to the same customary right as the land to which it had been so added.(5)

Section 32.

On p. 206,* delete the paragraph beginning with the words "The High Court," and substitute therefor the following fresh paragraph:—

(1) 8 Beng. L.R., O.J., 18, 45.
(2) I.L.R. 14 Calc. 839, 855.
(3) 8 Bom. H.C.R., O. J. 181, 193.
(4) *Royal Mail Steam Packet Co.* v. *George & Branday*, L.R. [1900] A.C. 480, 491–495.
(5) *Mercer* v. *Denne*, L.R. [1905] 2 Ch. 538; [1904] 2 Ch. 534.

* **The references to pages are to the pages in the 2nd Edition.**

Section 9 of the Specific Relief Act (Act I of 1877), which gives a right to recover possession of immoveable property, of which a person has been dispossessed, by a suit instituted within six months from the date of the dispossession, irrespective of the title to the property, has been held by the Calcutta High Court in a Full Bench case (by a majority of three out of five Judges, two dissenting) not to apply to the case of a right, held by a person not as appurtenant to any immoveable property but as a personal right or right in gross, to fish in water covering land belonging to another.(1)

On p. 206,* next after the last paragraph in the commentary on section 32, insert the following fresh paragraph :—

That section has also been held, by a Bombay decision, not to apply to a right of way held as appurtenant to immoveable property, *i.e.* as an easement.(2) And an easement of way was, in a Calcutta case, held not to be within section 15 of Act XIV of 1859.(3)

Section 33.

On p. 208,* next after the paragraph ending with the words "commentary on section 35," insert the following fresh paragraph :—

In *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*,(4) in which a public road, vested in the plaintiffs, as an Urban Authority, as limited proprietors, under the Public Health Act, 1875, had been caused to subside by mining operations carried on by the owners of a mine extending under the road, Jelf J., who held that the measure of damages to which the plaintiffs were entitled was not the cost of restoring the road to its original level, but merely the cost of making it as

(1) *Fadu Jhala* v. *Gour Mohun Jhala*, I.L.R. 19 Calc. 544 (Full Bench); *Natabar Parue* v. *Kubir Parue*, I.L.R. 18 Calc. 80. Compare also *Fuzlur Rahman* v. *Krishna Prasad*, I.L.R. 29 Calc. 614 (a case of a *hât*).

(2) *Mangaldas* v. *Jewanram*, I.L.R. 23 Bom. 673.

(3) *Haro Dyal Bose* v. *Kristo Gobind Sein*, 17 W.R. 70.

(4) L.R. [1905] 2 K.B. 823.

* The references to pages are to the pages in the 2nd Edition.

commodious as it was before, as a public highway, expressed the following *obiter* opinion: "Even in the case of a private road, where of course the proprietary right is unlimited, I do not think that a right to recover the cost of restoring it to its original level when sunk by mining operations can be maintained, although, no doubt, in addition to the cost of making it as commodious as before to the owner, something might be charged for any loss of amenities sustained."(1)

On pp. 210, 211, 212,* delete the whole of the two paragraphs beginning respectively with the words "In *Back* v. *Stacey*" and "In England," and the footnotes belonging thereto.

On p. 210,* in footnote (2), next after the reference to *Ormerod* v. *Todmorden Mill Co.*, insert the following:—

Roberts v. *Gwyrfai District Council*, L.R. [1899] 2 Ch. 608; 1 Ch. 583.

and to footnote (3), on the same page, add the following:—

See also *Roberts* v. *Gwyrfai District Council*, L.R. [1899] 2 Ch. 608; 1 Ch. 583. And see notes to section 7, *Illustrations* (*h*) and (*j*) on p. 36,* and addenda thereto in Supplement.

On p. 212,* next after the words "deprived by the defendant's obstruction," insert the following (changing the full stop after "obstruction" into a comma):—

or that the dominant tenement, or the room therein which may be in question, receives light through other windows besides that or those the obstruction of which is complained of, which together with the light still received through the latter window or windows since the obstruction amounts to as much, or more than as much, as the plaintiff is entitled to; unless the plaintiff has acquired, by prescription or by grant, a right to such additional light received from other quarters, in which case such additional light received from other quarters, ought to be taken into account.(2)

(1) L.R. [1905] 2 K.B. at pp. 826, 827.

(2) See Judgment of Lord Lindley in *Colls* v. *Home & Colonial Stores, Ld.*, L.R. [1904] A.C. at pp. 210, 211; and see *Dyers' Co.* v. *King*, L.R. 9 Eq. 438; *Kine* v. *Jolly*, L.R. [1905] 1 Ch. at pp. 493, 497, 498.

*** The references to pages are to the pages in the 2nd Edition.**

On p. 216,* in continuation of the paragraph ending with the word "erection," insert the following:—

But as against the owner, or the occupier, of the tenement over which there has been enjoyment of a benefit, for the beneficial enjoyment of another tenement, by the owner of the latter tenement, for less than the period required by law for creation of a prescriptive easement, no right is acquired by such enjoyment and no action is maintainable for obstruction to such enjoyment by anything done by the owner or occupier of the former tenement on or in that tenement.(1)

Section 34.

On p. 222,* in continuation of the paragraph ending with the word "produced," insert the following:—

And it results from that rule that, in a suit for damages by a person whose land or buildings have sustained damage by subsidence caused by previous mineral workings by the defendant, which have been discontinued, the plaintiff cannot obtain damages for any depreciation or diminution in the present selling value of his property caused by the apprehension, however well-founded, of future further damage which may result from those previous workings.(2)

On p. 224,* in continuation of the paragraph ending with the words "in *Rylands* v. *Fletcher*," insert the following:—

The decision of Bruce J. in *Greenwell* v. *Low Beechburn Coal Co.*(3) was followed by Kekewich J. in *Hall* v. *Duke of Norfolk.*(4) In the latter case, a subsidence of the plaintiff's land and consequent damage to his house situate thereon, for which an easement of support from the adjoining land

(1) *Bonner* v. *Great Western Ry. Co.*, L.R., 24 Ch. D. 1; *Greenhalgh* v. *Brindley*, L.R. [1901] 2 Ch. 324, 328; *Boyce* v. *Paddington Borough Council*, L.R. [1903] 2 Ch. 556, at p. 560.

(2) *Tunnicliffe & Hampson, Ld.* v. *West Leigh Colliery Co., Ld.*, L.R. [1905] 2 Ch. 390, 398.

(3) L.R. [1897] 2 Q.B. 165.

(4) L.R. [1900] 2 Ch. 493.

*** The references to pages are to the pages in the 2nd Edition.**

had been acquired by prescription, occurred after the 1st defendant had become the owner of that adjoining land, as trustee under the will of its last previous owner, who died in 1895, but had been caused entirely by workings in a coal mine in that adjoining land carried on by that last owner in the years 1889 to 1891. The suit was brought in 1899. It was held that the 1st defendant was not, nor, therefore, were those to whom he had leased the coal mine and their assignees, the other defendants, liable for the damage.

Section 35.

On p. 227,* to footnote (3) add the following :—

Cowper v. *Laidler*, L.R. [1903] 2 Ch. 337, at p. 340.

On p. 228,* to footnote (1) add the following :—

Similarly, in *Jackson* v. *Duke of Newcastle* (3 De G., J., & S. 275; 33 L.J., Ch. 698) Lord Westbury L.C., after referring to what Lord Eldon laid down in *Attorney-General* v. *Nichol* (16 Ves. 338; 10 R.R. 186), stated the rule thus: "The foundation of the jurisdiction appears to be that injury to property which renders it in a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The Court considers that injury of this nature does not admit of being measured and redressed by damages."

On p. 229,* in continuation of the paragraph ending with the word "exception", insert the following:—

In *Higgins* v. *Betts*(1) Farwell J. expressed it as his opinion that there was nothing in *Colls* v. *Home & Colonial Stores, Ld.*(2) which overruled the decision in *Shelfer* v. *City of London Electric Lighting Co.*(3)

On p. 235,* to footnote (1) add the following :—

See also *Kalliandas* v. *Tulsidas*, I.L.R. 23 Bom. 786.

On p. 237,* next after the paragraph ending with the words "which he got," insert the following fresh paragraphs :—

(1) L.R. [1905] 2 Ch. at p. 217.
(2) L.R. [1904] A.C. 179.
(3) L.R. [1895] 1 Ch. 287, 323.

***The references to pages are to the pages in the 2nd Edition.**

In *Boyson* v. *Deane*(1) the Court of first instance found that there had been a material disturbance, by certain buildings erected by the defendants, of the plaintiffs' right of light and air in respect of certain windows, interfering with their physical comfort and preventing them from carrying on their accustomed business as beneficially as they had done before, and held that it was a case in which the discretionary power to grant a mandatory injunction ought to be exercised. On appeal, the injunction was dissolved, the Court being of opinion that it was a case in which pecuniary damages only should be awarded. In regard to the law, in the course of his judgment the Offg. Chief Justice said: "If I may take *Martin* v. *Price*(2) as a statement of the English law on the subject, I think it must be admitted that it is different from the law we have to administer here under the Specific Relief Act and the Easements Act; see *Dhunjibhoy Cowasji Umrigar* v. *Lisboa*,(3) and *Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*(4). . . . . According to that decision" (*Martin* v. *Price*) "the rule of English law is the converse of the rule prevailing here. There the right to an injunction is the *primâ facie* right: here an injunction is not to be given when the remedy in damages is considered adequate."(5) In regard to the facts, his Lordship, after referring to *Lazarus* v. *Artistic Photographic Co.*(6) and *Lanfranchi* v. *Mackenzie*(7) as authorities going to show that a complaint of disturbance of an easement of ancient lights is not established by proving that in consequence of the defendant's acts the light has become a reflected light, said: "The point is of importance in this case because the gist of the plaintiffs' complaint is that now, or rather when the building had reached its full height, they got a reflected light which was not suitable for the business of sampling

(1) I.L.R. 22 Mad. 251.
(2) L.R. [1894] 1 Ch. 276.
(3) I.L.R. 13 Bom. 252.
(4) I.L.R. 18 Bom. 474.
(5) I.L.R. 22 Mad. at pp. 254, 255.
(6) L.R. [1897] 2 Ch. 214.
(7) L.R. 4 Eq. 421.

indigo. I cannot help thinking that if the complaint had not been made the learned Judge would have contented himself with giving relief in the way of damages . . . . . In the present case I am of opinion that the damage proved is comparatively small, and is very far short of rendering the plaintiffs' premises useless. There is no evidence as to the value of the property, but it certainly cannot be assumed that the depreciation caused by the darkening of the windows would amount to any considerable percentage of the selling value of the house. Again, and this I think is most important, no attempt has been made to prove that the plaintiffs cannot, at a moderate expense, so alter or re-arrange their premises as to neutralize the effect of the defendants' building. If this is possible, I do not see how the plaintiffs can say that compensation in money will not afford them adequate relief."(1)

The principle laid down in *Martin* v. *Price*(2) and *Shelfer* v. *City of London Electric Lighting Co.*,(3) governing the question when damages ought and when they ought not to be awarded, instead of an injunction, under the law of England, in cases of obstruction, caused, or threatened, to ancient lights, was again applied in *Jordeson* v. *Sutton, Southcoates, & Drypool Gas Co.*,(4) in which the defendants were about to erect on their land a new gasometer of a much greater height than that of their existing one, and which, if so erected, would materially obstruct the access of light to windows of the plaintiff's houses in respect of which he had acquired a prescriptive right to such light, and an injunction was granted restraining the defendants from erecting a gasometer of a greater height than that of the old one. All the Judges of the Court of Appeal in the case(5) held the plaintiff to be entitled to the injunction, but the following

(1) I.L.R. 22 Mad. at pp. 253, 255.
(2) L.R. [1894] 1 Ch. 276.
(3) L.R. [1895] 1 Ch. 287.
(4) L.R. [1899] 2 Ch. 217 (C.A., confirming North J. [1898] 2 Ch. 614). So also in *Cowper* v. *Laidler*, L.R. [1903] 2 Ch. 337.
(5) Lindley M.R., Rigby and Vaughan Williams L.J.J.

observations which were made by Vaughan Williams L.J. in his judgment are noteworthy with reference to the question how, under the English law, the discretionary jurisdiction to grant an injunction or award damages in lieu of an injunction should be exercised in cases of infringements of easements of light :—(1)

I confess that I think this is a case in which it would have been right to award damages if the Court had a discretion to choose the remedy which would be most likely to work out substantial justice between the parties. For in this case the defendants have not committed or continued a nuisance with the purpose of compelling the plaintiff to sell. The case is not one in which the plaintiff is being disturbed in the occupation of business premises or the enjoyment of his dwelling-house. The cottages are let to weekly tenants and, as far as the plaintiff is concerned, are a mere investment of money. Moreover, I cannot entirely leave out of consideration that the plaintiff, as owner of houses situated within 300 yards of the limits within which works are intended to be constructed, had, under the standing orders of Parliament, notice that the bill which resulted in the Special Act asked for authority to erect gasholders, &c., on the lands shewn on the deposited map. This, of course, is not notice of an intention to erect a gasholder at the spot where, or of the height which, the gasholder was in fact erected; but I take it that the effect of the notice was to give those who received it a locus standi to ask for such conditions as they thought fit. The defendants may well have supposed that, no objection having been made, they had a right to erect any gasholder which was reasonably necessary for the supply of gas to the district at any spot within the limits of those lands on which Parliament had by the Act of 1873 authorized the erection of gasholders and other buildings, especially as at the time of the passing of the Act the plaintiff had no ancient lights, nor right to have the light to windows unobstructed.

I mention these circumstances to emphasize the fact that the defendants were not deliberate wrong-doers seeking by a money payment to carry through a wrong. I however agree with the rest of the Court that it is difficult in this case, consistently with the principles laid down in *Shelfer* v. *City of London Electric Lighting Co.*(2), to refuse an injunction and award damages in lieu of an injunction.

Shelfer's Case(2), however, does not say that, whenever a plaintiff's legal right is infringed and further infringement is intended to a mate-

(1) L.R. [1899] 2 Ch. at pp. 258, 259, 260.
(2) L.R. [1895] 1 Ch. 287.

rial extent, the plaintiff is entitled to an injunction ex debito justiciæ and that the Court has no discretion in the matter. On the contrary, *Shelfer's Case*(1) really affirms the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances although such jurisdiction ought not to be exercised except under very exceptional circumstances. The present Master of the Rolls and A. L. Smith L. J., both of them, without attempting a hard and fast definition, suggest examples of such special circumstances. The Master of the Rolls takes, as an example, a case in which the plaintiff has shewn that he only wants money. This must generally be difficult to prove, but ought not to be impossible to prove, in a case where the defendants have not acted oppressively, and the plaintiffs have only a money interest, that is, an investor's interest, in the property affected by the infringement of the legal right. I cannot help thinking myself that the high-handed conduct proved against wealthy defendants in some of the injunction cases brought before the Courts have had a tendency to limit somewhat unduly the practice of the Courts in the exercise of the discretion to award damages in lieu of an injunction. It is true that Lord Cairns' Act had for its object to avoid the necessity of sending a plaintiff to the common law Courts in a case where damages were the proper remedy; but it still remains the fact that an injunction should only be awarded to those whose conduct entitles them to the interference of a Court of equity."

Where the defendant, the owner of a piece of land in a town, proposed to erect thereon certain lofty buildings, which if erected would materially obstruct ancient lights of the plaintiff's cottage and thereby cause substantial damage to the plaintiff, the fact that his right to the easement enabled the plaintiff to command a fancy price for the sale of the cottage to any one desiring to build on that piece of land and that he declined to sell it for less than such price, was held not to be extortion or oppression and to be no ground for refusing him an injunction restraining the erection of the proposed buildings and awarding him damages instead of an injunction.(2)

On p. 237,* in continuation of the paragraph ending with the words "light or air," insert the following:—

Observations, however, of Lord Halsbury L.C. in *Colls* v.

(1) L.R. [1895] 1 Ch. 287.
(2) by Buckley J. in *Cowper* v. *Laidler*, L.R. [1903] 2 Ch. 337.

* **The references to pages are to the pages in the 2nd Edition.**

Home & Colonial Stores, Ld.(1) appear to shew that he was of opinion that the locality in which the dominant owner's house is situate ought to be taken into account, in considering whether an obstruction to ancient lights amounts to a nuisance and is therefore actionable.

On p. 237,* next after the new passage last above directed to be inserted, insert the following fresh paragraph :—

In the case of the natural rights of riparian owners in respect of the water and the flow of a natural stream, on which their land abuts or which flows through it,(2) if such rights are materially infringed by the action of an upper, or of a lower riparian owner, or of any other person, claiming to take such action as of right, so that his adverse claim to alter, pollute, or otherwise affect the natural flow, or purity of the water, of the stream to the material prejudice of the riparian owner injured thereby, would, after exercising it uninterruptedly for twenty years, mature into a right to do so, the latter is, at least under the English law, entitled (in the absence of acquiescence on his part or some other special disqualifying ground) to obtain a perpetual injunction restraining the wrong-doer from such action ; and this, even though he may not have sustained any actual damage thereby.(3) In *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.*,(3) in which the House of Lords, confirming the Court of Appeal, granted an injunction, Lord Cairns L.C., in his speech, said : "It is a matter quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained, or has not been sustained, by the respondents. If the appellants are right, they would,

(1) L.R. [1904] A.C. at p. 185. See also *Kine* v. *Jolly*, L.R. [1905] 1 Ch. at pp. 497, 498 (Judgment of Romer L.J.) and p. 484; *Higgins* v. *Betts*, L.R. [1905] 2 Ch. at p. 216 (Judgment of Farwell J.).

(2) See section 7, *Illustrations* (*f*), (*h*), and (*j*) and Commentary thereon.

(3) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L.R 7 H.L., E. & Ir. App., 697; 9 Ch. App. 451 ; *Roberts* v. *Gwyrfai District Council*, L.R. [1899] 2 Ch. 608; [1899] 1 Ch. 583.

*** The references to pages are to the pages in the 2nd Edition.**

at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be."(1) Similarly, in *Roberts* v. *Gwyrfai District Council*,(2) in which the defendants had executed works which had the effect of materially altering the flow of a natural stream through the riparian tenement owned by the plaintiff, and claimed to be legally entitled to execute and maintain such works, the Court of Appeal(3) granted an injunction, although the plaintiff had sustained no actual damage, and it was questionable on the evidence whether the effect of the defendants' works was not even to improve the flow of the stream for the purposes for which the plaintiff made use of it.(4) In *Bickett* v. *Morris*(5) the House of Lords confirmed the decision of the Court of Session of Scotland, which held that if a riparian owner on one side of a natural stream erects a wall or other building on the *alveus* or bed of the stream, though it be erected only on a portion of that part of the *alveus* which, being on his side of the *medium filum* of the stream, is his own property, and though no damage has been actually sustained by the opposite riparian owner in consequence of such erection, yet, if such erection is a substantial encroachment on the bed of the stream and not so very slight as to be quite trivial and inappreciable, it is, by the law of Scotland, an infringement of the rights of the opposite owner and entitles him to obtain a decree ordering such invader of his rights to remove the building; and the burden of proving that the erection is not such as to be

(1) L.R. 7 H.L., E. & Ir. App., at pp. 705, 706.
(2) L.R. [1899] 2 Ch. 608; [1899] 1 Ch. 583.
(3) confirming Kekewich J.
(4) See also p. 36,* notes to section 7, *Illustrations* (*h*) and (*j*), and *addenda* thereto in Supplement.
(5) L.R. 1 H.L., Sc. & Div. App., 47.

*** The references to pages are to the pages in the 2nd Edition.**

injurious to the opposite owner lies on the party who has made the erection. And the English law, in such a case, would appear to be the same as the Scottish law as laid down by this decision.

On p. 237,* in the third line of the paragraph beginning with the words "The Courts," alter the words "the building" into the words "a building which, if proceeded with, would disturb the plaintiff's easement of light."

On p. 238,* next after the words (in the first line) "and of his conduct," insert, as part of the same paragraph, the following:—

So,—in a case which was not one of a right to light,—where, by virtue of a decree, in a previous suit, passed in accordance with a compromise, the defendant was the proprietor of certain land, but the plaintiff had the right to stack his grain on it, and neither of the parties had the right to build on it, and the defendant, subsequently to that decree, erected certain buildings on the land, and the plaintiff sued him for possession of the land, claiming to be the proprietor of the land, and also for a mandatory injunction to remove the buildings, but did not bring his suit until $2\frac{3}{4}$ years after the erection of the buildings, the Court refused to grant a mandatory injunction. The Court's decision was also based on the ground that the plaintiff in the Court of first instance had claimed the demolition of the buildings entirely on the basis of a proprietary right to the land, to which he was not entitled, and not, as he ought to have done, on the basis of a right of easement.(1)

On p. 238,* next after the words "the desired remedy," insert, as part of the same paragraph, the following:—

So, in *Benode Coomaree Dossee* v. *Soudaminey Dossee*(2), notice given by the plaintiff to the defendant not to continue

(1) *Haji Syed Muhammad* v. *Gulab Rai*, I.L.R. 20 All. 345. See also *Benode Coomaree Dossee* v. *Soudaminey Dossee*, I.L.R. 16 Calc. 252.

(2) I.L.R. 16 Calc. 252.

*** The references to pages are to the pages in the 2nd Edition.**

the erection of the building so as to obstruct the plaintiff's lights was held insufficient ground for granting a mandatory injunction to pull it down, legal proceedings not having been taken till after it had been completed; and the Court said: "the authorities shew that mere notice, not followed by legal proceedings, is not sufficient."(1)

On p. 239,* in continuation of the paragraph ending with the word "owner", insert the following:—

If, however, the interference with the plaintiff's enjoyment of the dominant tenement for the ordinary purposes of inhabitancy or business caused by the building erected by the defendant is so slight that only very small damages could be awarded, this of itself is sufficient to disentitle the plaintiff to a mandatory injunction, though there may be no other ground, such as laches on his part, disentitling him thereto. In his judgment in *Colls* v. *Home & Colonial Stores, Ld.* Lord Lindley said:(2) "I am convinced that even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small, and to grant a mandatory injunction in such a case as this would be unduly oppressive and not in accordance with the principles on which equitable relief has been usually granted: see the *Curriers' Co.* v. *Corbett*,(3) *Robson* v. *Whittingham*,(4) and *National Provincial Plate Glass Co.* v. *Prudential Assurance Co.*,(5) in all of which an injunction was refused, although the plaintiff's legal right had been infringed. In *Warren* v. *Brown*(6) the Court of Appeal only gave damages. The present case is eminently one in which damages would be an adequate remedy, even assuming the plaintiffs could prove a small nuisance for which some

(1) (Judgment) I.L.R. 16 Calc. at p. 266.
(2) L.R. [1904] A.C. at p. 212.
(3) 2 Dr. & Sm. 355.
(4) L.R. 1 Ch. 442.
(5) L.R. 6 Ch. D. 757, at p. 761.
(6) L.R. [1902] 1 K.B. 15.

*** The references to pages are to the pages in the 2nd Edition.**

damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue. The general rule that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by Sir George Jessel in *Aynsley* v. *Glover*,(1) and more recently by the Court of Appeal in *Shelfer* v. *City of London Electric Lighting Co.*"(2) It is clear from section 54, sub-section (*c*), section 55, and section 56, sub-section (*i*), of the Indian Specific Relief Act that neither a mandatory nor a prohibitory injunction should be granted by the Indian Courts where damages alone would "afford adequate relief"; there is no doubtfulness or difficulty as to the law; the difficulty lies, in many cases, in the application of the law to the facts of the particular case,—in deciding with reference to those facts whether the proper relief is an injunction, or damages, or both.

On p. 239,* next after the new passage last above directed to be inserted, insert the following fresh paragraph :—

In *Kine* v. *Jolly*(3) Kekewich J. found on the evidence that by the erection of the defendant's building there had been a large obstruction to the light which had previously had access to a room in the plaintiff's house, through the window affected thereby, (which was an "ancient light,") and a large interference with its cheerfulness, and the selling and letting value of the house had been materially diminished, but that the room was, notwithstanding the obstruction, still well lighted and still had sufficient light left to enable the room to be used for the purpose for which it was designed, and he granted a mandatory injunction against the defendant to pull down so much of the building as caused a nuisance to the plaintiff. On appeal Vaughan Williams and Cozens-Hardy L.J.J., accepting the findings of fact set

(1) L.R. 18 Eq. 551 et seq.
(2) L.R. [1895] 1 Ch. 310, 314, 316, 322.
(3) L.R. [1905] 1 Ch. 480.

*** The references to pages are to the pages in the 2nd Edition.**

forth by Kekewich J. in his judgment, as that judgment was understood by them, held thereon that the interference with the access of light complained of amounted to a nuisance,(1) but that a mandatory injunction ought not to be granted but damages only should be awarded, there having been no sharp practice or unfair conduct on the part of the defendant, and it being in their Lordships' opinion a case in which damages would afford adequate compensation.

On p. 239,* next after the paragraph ending with the word "interference," insert the following fresh paragraph :—

Even in the case of mandatory injunctions, the form of the injunction, granted by the Courts in England, was prohibitory or interdictory ; *e.g.* in the case of a mandatory injunction for the demolition of a building, the injunction was expressed in terms prohibiting the defendant from allowing the building to remain.(2) But now such injunctions are expressed in direct mandatory form.(3)

On p. 239,* delete the passage from the words "By the English law" to the words "will be entitled to an injunction," and also footnote (5).

On p. 240,* next after the words "will be no defence," insert, as part of the same paragraph, the following :—

On the other hand, it does not necessarily follow from the fact that by the erection of a building by the defendant the angle of light and air coming to the plaintiff's windows (being ancient lights) is reduced to less than 45 degrees that the plaintiff has a right of action.(4)

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(1) The contrary was held by the third Judge of the Appellate Bench, Romer L.J., as well on his own findings on the evidence, as on Kekewich J.'s findings thereon as expressed in his judgment, so far as he could understand that judgment.

(2) *Jackson* v. *Normanby Brick Co.*, L.R. [1899] 1 Ch. 438, at p. 439, footnote (1).

(3) *Jackson* v. *Normanby Brick Co.*, L.R. [1899] 1 Ch. 438, 439.

(4) *Chotalal Mohanlal* v. *Lallubhai Surchand*, I.L.R. 29 Bom. 157.

* The references to pages are to the pages in the 2nd Edition.

On p. 240,* in continuation of the paragraph ending (on last line of page) with the word "case," insert the following:—

In his judgment in *Colls* v. *Home and Colonial Stores, Ld.* Lord Lindley said:(1) "There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window: *Theed* v. *Debenham.*(2) But experience shews that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well. The late Lord Justice Cotton pointed this out in *Ecclesiastical Commissioners* v. *Kino*:(3) see also *Parker* v. *First Avenue Hotel Co.*"(4)

On p. 241,* next after the paragraph ending with the words "effect of it," insert the following fresh paragraph:—

As to the expediency of appointing an expert to report to the Court on the effect of a building alleged to be an obstruction to the plaintiff's ancient lights, and as to the value of an inspection by the jury, or by the judge, of the premises in question, and of accurate models of the premises (for production as exhibits before the Court) see observations of Lord Macnaghten in *Colls* v. *Home and Colonial Stores, Ld.*(5), and of Romer L.J. in *Kine* v. *Jolly.*(6)

On p. 242,* next after the paragraph ending with the word "support," insert the following fresh paragraph:—

Remedies in case of disturbance of customary rights in the nature of easements.

In the case of easements, or *quasi*-easements, to which a local class of persons, such as the inhabitants of a parish, are entitled, as, *e.g.*, a right of way to and from a church or a market, an indictment will not lie for the obstruction of

(1) L.R. [1904] A.C. at p. 210.
(2) L.R. 2 Ch. D. 165.
(3) L.R. 14 Ch. D. 228.
(4) L.R. 24 Ch. D. 282.
(5) L.R. [1904] A.C. at p. 192.
(6) L.R. [1905] 1 Ch. 498, 499.

* **The references to pages are to the pages in the 2nd Edition.**

such a way, because it is in law a private and not a public way, but any one of the parishioners has a right of action for damages, or for an injunction, prohibitory or mandatory, or for both (as the case may be), without having to shew special damage to himself from such obstruction.(1)

On p. 242,* next after the paragraph ending with the word "disturbance," insert the following fresh paragraph :—

Injunction refused, but damages awarded, though not specifically claimed.

In a suit for an injunction in respect of a building in course of erection by the defendant as being an obstruction to the plaintiff's easement of light and air, in which the obstruction of the light and air was held to be insufficient to entitle the plaintiff to an injunction, but was found to cause a sensible diminution of the light and air, it was held that he could obtain a decree for damages, for the injury sustained, in the same suit, although he had not asked in his plaint for damages.(2) The plaint asked for a mandatory and a prohibitory injunction and for such other relief as the Court might think fit to grant.

On p. 242,* to footnote (5) add the following :—

Cowper v. *Laidler*, L.R. [1903] 2 Ch. 337.

On p. 243,* next after the paragraph ending with the word "building," insert the following fresh paragraphs :—

Mámlatdars' Courts Act (Bombay), suits under.

The jurisdiction of a Mámlatdar under the Mámlatdars' Courts Act (Bombay Act III of 1876), in suits relating to water rights, is limited to an enquiry as to whether the plaintiff was in the enjoyment of the water, of the enjoyment of which he complains that the defendant has deprived him, at the time when the alleged deprivation took place, whether such deprivation did take place, and, if so, whether the suit has been brought within six months from the date on which the cause of action arose, and, if he finds on all these questions of fact in the affirmative, he has jurisdiction to issue an injunction to the defendant requiring him to refrain from

(1) *Brocklebank* v. *Thompson*, L.R. [1903] 2 Ch. 344, 348, 355.
(2) *Kalliandas* v. *Tulsidas*, I.L.R. 23 Bom. 786.

* The references to pages are to the pages in the 2nd Edition.

causing such deprivation to the plaintiff of his use of the water; and he has no jurisdiction to enquire into or adjudicate on any question of title to the use of the water, except in so far as actual possession or enjoyment constitutes a primâ facie title; and no proceedings in his Court affect the right of the parties to litigate the question of title in the ordinary Civil Courts.(1)

In the Full Bench case of *Som Gopal Bhogale* v. *Vinayak Bhikambhat*(2) the majority of the members of the Bench held that the Mámlatdars' Courts Act applies to natural as well as to artificial watercourses. Whitworth J., who dissented, was of opinion, for the reasons given in his judgment, that, in regard to the words in section 4 of the Act "any well, tank, canal, or watercourse," the word "watercourse" should be interpreted as meaning watercourses *ejusdem generis* with the other three subjects of water supply specified, which are all artificial. In the same case it was held that a mámlatdar's jurisdiction extends to a case where the obstruction to the plaintiff's use of the water of a watercourse is caused by something done by the defendant on his own land or in the watercourse where it passes through or alongside of his own land,(3) and two of the members of the Bench, Candy and Crewe J.J., dissented from that part of the judgment in *Babaji Ramji* v. *Babaji Devji*(4) in which the contrary view appears to have been taken. One of the Judges, in the Full Bench case, however, Ranade J., was of opinion that the judgment in *Babaji Ramji* v. *Babaji Devji* could not be regarded as maintaining such contrary view; that the principal dispute in that case was whether the defendant, who was one of a number f riparian proprietors who were severally entitled by virtue of a custom to erect and maintain dams across a stream for the purpose of irrigating their respective lands, ought to

(1) *Balvantrao* v. *Sprott*, I.L.R. 23 Bom. 761.
(2) I.L.R. 25 Bom. 395. See also *Narayan* v. *Keshav*, I.L.R. 23 Bom. 506.
(3) See also *Rakhma* v. *Tulaji*, I.L.R. 19 Bom. 675; *Balvantrao* v. *Sprott*, I.L.R. 23 Bom. 761.
(4) I.L.R. 23 Bom. 47, 49, 50.

keep open a sluice in his own dam so as to permit water to flow down to the lands of the plaintiff, who was another of those riparian proprietors, that this dispute was held not to be a dispute about possession cognizable by the mámlatdar, that as to actual disturbance or dispossession there was no dispute in that case, and that therefore there was no conflict between the judgment in that case and those in other cases.(1)

Section 18 of the Mámlatdars' Courts Act provides that the party to whom the mámlatdar shall give immediate possession, or restore a use, or in whose favour he shall grant an injunction, shall be entitled to continue in possession or use until ousted by a decree or order of an (ordinary) Civil Court, and "that in any subsequent suit or other proceeding in the ordinary Civil Court between the same parties, or other persons claiming under them, the mámlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive." A decree or order merely affecting the right to *possession* of "lands, premises, trees, crops or fisheries or of any profits of the same," or the right to the *use* "of water from wells, tanks, canals, or watercourses," of which a person has been dispossessed or deprived otherwise than in due course of law,(2) would, of course, even apart from any express statutory saving provision, not affect the right of the parties to have the question of title tried in a Court having jurisdiction to try and determine that question. But it has been held, in a Full Bench case,(3) by the Bombay High Court, that a person who has brought a suit for possession in a mámlatdar's Court which has been tried and dismissed, is also entitled, by the express provisions in section 18 of the Mámlatdars Act, to bring, and is not precluded by the mámlatdar's decision from bringing, subsequently, another

(1) I.L.R. 25 Bom. at pp. 405, 406. See also the judgment in *Narayan* v. *Keshav*, I.L.R. 23 Bom. at p. 509.

(2) See Mámlatdars' Courts Act, s. 4.

(3) *Ramchandra* v. *Narsinhacharya*, I.L.R. 24 Bom. 251.

suit for possession, on the same cause of action, under section 9 of the Specific Relief Act in an ordinary Civil Court. A person against whom an adverse decision has been passed, after trial, in a suit brought by him in a mámlatdar's Court for recovery of "possession" of a fishery, to which he claims to have a right in gross, in waters *in alieno solo*, could, therefore, maintain a suit subsequently brought by him under section 9 of the Specific Relief Act, in an ordinary Court, on the same cause of action, for recovery of "possession" of the fishery, enjoyment of such a fishery having been held by the Bombay High Court to be "possession" of "immoveable property" within the meaning of that section.(1)

In *Nagappa* v. *Sayad Badrudin*(2) it was held that where a Magistrate under section 145 of the Criminal Procedure Code has decided that one of two contesting parties was in possession of certain land at the date of his preliminary order passed under the first paragraph of that section, and has accordingly passed an order declaring that party's right to retain possession till evicted in due course of law, the Magistrate's decision and order do not preclude a mámlatdar from entertaining a suit for possession instituted in his Court less than six months after the date of the Magistrate's preliminary order by the other party against the party in whose favour the Magistrate's decision was, and trying and deciding the question as to who was in possession on the date of the Magistrate's preliminary order and for so much of the period of six months next before the filing of the suit as preceded the date of that order. This decision would, apparently, apply if the subject-matter of the proceedings before the Magistrate and of the subsequent suit in the mámlatdar's Court were a right of fishery in waters *in alieno solo*, "fisheries" being included within the defini-

(1) *Bhundal Panda* v. *Pandol Pos Patil*, I.L.R. 12 Bom. 221. See also note in commentary on section 32 (p. 206 *), and addenda thereto in Supplement.

(2) I.L.R. 26 Bom. 353.

*** The references to pages are to the pages in the 2nd Edition.**

tion given in section 145 of the Criminal Procedure Code of "land and water;" unless it ought to be held that section 145 applies to cases of dispute concerning water only where what is claimed includes the right to the possession of the soil underlying the water, and not to cases where the claim is to a right *in alieno solo*, and that the latter class of cases ought always to be dealt with under section 147. In *Hurbullubh Narain Singh* v. *Meswar Prosad Singh*,(1) which was held to be a case properly coming under section 145, and not under section 147, the subject-matter of the dispute was, as adjudged by the High Court, not the right to use a ferry, but the ferry, "including the land and water upon which the ferry is exercised."(2)

On p. 244,* in continuation of the paragraph ending with the word "thereto," insert the following:—

Whether the injunction is a prohibitory or a mandatory one, the mode of enforcement to be followed, in case of disobedience, is that prescribed by section 260 of the Civil Procedure Code, *viz.* that by way of imprisonment of the judgment-debtor, or attachment of his property, or both. The Court has no power, on an application for enforcement of an injunction decree restraining the defendant from obstructing the access of light and air to the plaintiff's windows, and ordering the defendant to lower a building, which has not been obeyed, to pass an order that the defendant shall remove the obstruction within a specified time, and that, in default of his so doing, an officer of the Court shall carry out the required demolition at the defendant's expense.(3)

On p. 244*, in continuation of the paragraph ending with the word "*Bottlewalla*," insert the following:—

The power given to Courts by section 493 of the Civil Procedure Code, Act XIV of 1882, to commit, and attach

(1) I.L.R. 26 Calc. 188.
(2) I.L.R. 26 Calc. at pp. 193, 194.
(3) *Sakarlal Jaswantrai* v. *Bai Parvatibai*, I.L.R. 26 Bom. 283.

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property of, a defendant in case of disobedience to a temporary injunction granted under that section is not exerciseable by them *suo motu*, but only at the instance of a party who deems himself aggrieved; nor has a District Court, or any other Court which is not a Court of Record, inherent power to commit for contempt of Court.(1)

Chapter V.

On p. 248,* next after the word (in first line of page) "compensation," insert, as part of the same paragraph, the following:—

A lease for a term of years of a piece of land and a colliery therein and the seams of coal lying in or under other adjoining land of the lessor, 335 acres in extent, with liberty to work those seams, so far as they could be worked from the existing pit in the first-mentioned piece of land, and without entering upon the surface of the said adjoining land, contained a proviso that if the lessee should think it necessary or advisable to sink a pit or pits through the surface of the said adjoining land he should be entitled to do so and to work the coal by means of such pit or pits, "but so that the position of such pit or pits be subject to the reasonable approval of the said lessor his heirs or assigns." The lessee was held to have an interest in the said surface and every part of it entitling him to compensation, under section 68 of the Lands Clauses Consolidation Act, 1845, from a railway company who under the powers given them by that Act, as incorporated in their special Acts, had after the commencement and before the expiration of the term of the lease contracted to purchase from the lessor for their railway, and constructed their railway over, about 5 acres of that surface, for his loss of that interest in the portion of the surface which had been taken by the railway company.(2)

(1) *Kochappa* v. *Sachi Devi*, I.L.R. 26 Mad. 494. But see *dictum* in Judgment in *Ram Saran* v. *Chatar Singh*, I.L.R. 23 All. 465, at p. 466.

(2) *Masters and Great Western Railway Co., In re*, L.R. [1901] 2 K.B. 84; [1900] 2 Q.B. 677.

* The references to pages are to the pages in the 2nd Edition.

Section 38.

On p. 260,* next after the word (in last line of page) "reconstructed," insert, as part of the same paragraph, the following :—

So, if, in rebuilding or altering a house or other building, a new skylight is set in a plane which is higher or lower than that in which an old skylight (which existed before the reconstruction) was set, but so nevertheless that a substantial portion of the cone of light which entered the old skylight enters the new one, the right to light which existed in respect of the old skylight, assuming that it was an "ancient light," is not thereby abandoned, but is preserved to the extent of that substantial portion(1). The right, in such cases, is retained, in respect of windows(2) of the new building, to such an extent—*i.e.* for so much of their area—(and no more) as those windows coincide with, *i.e.* receive the same cones of light as were received by, the windows (assuming them to have been "ancient lights") of the old building.(3)

On p. 260,* to footnote (3) add the following :—

Bai Hariganga v. *Tricamlal*, I.L.R. 26 Bom. 374; *Smith* v. *Baxter*, L.R. [1900] 2 Ch. 138.

On p. 261,* next after the words "for want of evidence," insert, as part of the same paragraph, the following :—

In *Smith* v. *Baxter*(4) evidence as to the dominant owner's intention to preserve the ancient lights, when rebuilding,—that is to say evidence of such intention other than that afforded by evidence on the question of fact whether the windows of the new building are so placed as to receive the same or a substantial portion of the same cones of light as

(1) *Smith* v. *Baxter*, L.R. [1900] 2 Ch. 138.

(2) or other apertures for the reception of light.

(3) See *Smith* v. *Baxter*, L.R. [1900] 2 Ch. 138, and especially the terms of the declaration made by the Court (p. 147).

(4) L.R. [1900] 2 Ch. 138, 142, 143. See also *Newson* v. *Pender*, L.R. 27 Ch. D. 43, 55, 59.

*** The references to pages are to the pages in the 2nd Edition.**

those in the old building received,—was held to be admissible, but unnecessary, the Court's decision being based on the evidence on that question of fact (as to the relative positions of the old and the new windows).

Section 46.

On p. 271,* in continuation of the paragraph ending with the word "right," insert the following:—

Where, however, there is a public right of footway along a strip of land, which is fenced on both sides, and there is also along the same strip a private right of way belonging to the owner of the entire strip of land, and he has not put up any fence separating a portion of the strip, as being for the public footway, from the remaining portion, as being for the private way, or taken other steps to restrict the public footway to a definite portion of the strip, the presumption arises that he intended to dedicate the entire strip to the use of the public as a footway.(1)

Section 52.

On p. 286,* in continuation of the paragraph ending with the words "Statute of Frauds," insert the following:—

So, in *Lowe* v. *Adams*(2) a memorandum of agreement, not under seal, in which the owner of certain lands agreed to let, and the defendant to hire, the shooting on those lands for a year at a certain rent, was held, by Cozens-Hardy J., to have passed to the defendant not a license but an incorporeal hereditament, as "having conferred a right to shoot and carry away the game when shot," and the learned judge cited, as relying on, *Fitzgerald* v. *Firbank*(3) (referred to above). It appears to have been a profit à prendre in gross. Where the owner, and mortgagor in possession, of an estate, which

(1) *Attorney-General* v. *Esher Linoleum Co., Ld.*, L.R. [1901] 2 Ch. 647.

(2) L.R. [1901] 2 Ch. 598, 601. See also *Hooper* v. *Clark*, L.R. 2 Q.B. 200.

(3) L.R. [1897] 2 Ch. 96.

*The references to pages are to the pages in the 2nd Edition

consisted of a mansion-house and gardens and demesne lands and agricultural lands, by an instrument under seal granted to the defendant what purported to be a lease for a term of years of the mansion-house, gardens, and demesne lands, and of the right of shooting and sporting over the agricultural lands, which right he had reserved to himself when making, previously to the mortgage, farm leases, which were still subsisting undetermined, of those lands, this transfer of shooting and sporting rights was held to be an occupation lease of an incorporeal hereditament within the meaning of the Conveyancing and Law of Property Act, 1881, s. 18.(1)

On p. 289,* next after the paragraph ending with the word "ejectment," insert the following fresh paragraphs :—

Where, by an agreement in writing, contained in two documents, the defendant agreed to let the plaintiff erect a hoarding on land belonging to the defendant,—the hoarding to be erected and kept in repair at the plaintiff's expense and to be the plaintiff's property,—and have the use of the hoarding, and also of a gable wall of a cottage belonging to the defendant, for posting bills and advertisements thereon, at a yearly rent payable on the usual quarter-days, it was held that the documents did not confer on the plaintiff any right to the exclusive possession of any property of the defendant, and therefore did not constitute a lease nor create the relation of landlord and tenant between the parties, but that their effect was to create a license, revocable at any time subject to the terms of the written contract, and that, regard being had to those terms, a quarter's notice terminating at the end of a current year was a reasonable and sufficient notice.(2)

By a deed of agreement between the plaintiff's predecessor in title, as owner of certain lands, and a railway company, the former agreed to grant and demise for a term of 1,000

(1) *Brown* v. *Peto*, L.R. [1900] 2 Q.B. 653.

(2) *Wilson* v. *Tavener*, L.R. [1901] 1 Ch. 578.

* The references to pages are to the pages in the 2nd Edition.

years to the company a way-leave on and over those lands, with power to make certain railways thereon which they were authorized by a special Act to make, and with the liability to pay, by way of yearly rent, 3*s.* per 45 tons on coals and certain other substances carried over the railways and shipped at a certain port. This agreement had been carried out, the railways having been made, and rent having been paid for carriage of coals, &c., over them as stipulated in the deed, for more than 40 years. It was held that the way-leave granted to the company by the deed was an interest or property in the grantor's lands, an incorporeal hereditament, and not, as was contended by the company, a mere liberty or license, and that therefore on the death of the grantor the right to receive the money payable yearly, under the deed, on coals, &c., conveyed passed to his successor in title in respect of the lands and not to his legal personal representative.(1)

In *Sundrabai* v. *Jayawant*(2) it was found proved that in a certain mahál a custom prevailed by which owners of the low-lying lands, the whole extent of which was small compared with that of the upper dry lands, were under an obligation to allow owners of the upper lands the use of their low-lying lands for raising therein young rice plants, for the purpose of being afterwards transplanted in the upper lands, wherein it was not practicable to raise the young plants. The plaintiff was the owner of some of the upper land, and the person under whom the defendant held as mortgagee was the owner of a plot of low-lying land, in a village situate within this mahál, and the plaintiff and his predecessors in title were proved to have exercised from 1814 down to 1894, when the suit was instituted, the right of raising young rice plants in a certain portion of every year in the said plot and then removing them for transplantation in his own land, and in 1864 the owner of the said plot had

(1) *Lord Hastings* v. *North Eastern Ry. Co.*, L.R. [1898] 2 Ch. 674, 678, 679; [1899] 1 Ch. 656, at p. 665.

(2) I.L.R. 23 Bom. 397.

by an instrument of agreement granted to the plaintiff the right to raise young rice plants in the plot every year in a certain part of the year, the grant being stated to be *nirantar* and no mention of the plaintiff's land being made in the agreement. It was held that the right of the plaintiff was not a license but an easement (as that word is used in the Indian Easements Act) in the nature of a *profit à prendre*, acquired by immemorial prescription, and confirmed to him by the agreement, "or more correctly a permanent lease of the land for a portion of the year for a specific purpose."(1)

Section 53.

On p. 291,* in continuation of the paragraph ending with the word "granted," insert the following:—

In regard, on the other hand, to the interests of the Thames Conservators in the bed of the Thames and the consequent extent of their right (if any) to grant licenses in respect thereof, it was held in another case(2) that under the Thames Conservancy Act, 1894, they had no power to grant a license to dredge in the bed of the river on the terms that the licensee might sell for his own benefit the soil raised by so dredging, the Conservators being bound by the Act to appropriate to the Conservancy fund the sale-proceeds of any such soil raised by dredging by them or their agents, servants or workmen, as might be sold.

On p. 291,* next after the new passage last above directed to be inserted, insert the following fresh paragraph:—

On the principle of public policy on which the law disfavours, and in most cases where they are absolute disallows validity to, covenants or contracts imposing restrictions on the power of alienation or disposition of property, such a covenant by a lessee in favor of his lessor, though allowed by law validity,(3) is construed strictly.(4) Upon this

(1) I.L.R. 23 Bom. at pp. 401, 402.
(2) *Palmer* v. *Thames Conservators*, L.R. [1902] 1 Ch. 163.
(3) See Transfer of Property Act (IV of 1882) ss. 10, 12.
(4) *Crusoe* v. *Bugby*, 2 W.Bl. 766.

* The references to pages are to the pages in the 2nd Edition.

principle a covenant by the lessee of an exclusive right of fishing with rods and lines in certain waters and having as his own the fish so caught, that he would not during the term underlet assign transfer or set over the demised premises to any person or persons without the consent in writing of the lessor, was held not to preclude the lessee from granting a valid license to another person, limited to two rods, to fish in those waters for the residue of the term granted by the lease, because the restrictive covenant did not expressly apply to a part of the premises demised, but only to "the said premises," and must be construed, strictly, as applying therefore only to the subject of the demise in its entirety.(1)

Section 63.

On p. 305,* next after the paragraph ending with the word "goods," insert the following fresh paragraph:—

Where the defendant had, by an agreement in writing, granted to the plaintiff what was held to be a license, to erect on the defendant's land a hoarding and to post advertisements thereon and on a wall belonging to the defendant, in consideration of a yearly rent payable on the usual quarter-days, the license was held to be revocable at any time but subject to the terms of the agreement, and it was held that, regard being had to those terms, a quarter's notice, terminating at the end of a current year, was a reasonable and sufficient notice of revocation of the license.(2)

(1) *Grove* v. *Portal*, L.R. [1902] 1 Ch. 727.
(2) *Wilson* v. *Tavener*, L.R. [1901] 1 Ch. 578.

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(a) *i.e.* rights inherent in the ownership of immoveable property imposing restrictions on owners of neighbouring immoveable property.